LE COPY

Office-Supreme Court, U.S.
FILED
FEB 10 1961
JAMES R. BROWNING, Clerk

No. 712

In the Supreme Court of the United States

JANUARY TERM, 1961

UTAH CITIZENS RATE ASSOCIATION and STRUCTURAL STEEL & FORGE CO.,

Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY,
THE WESTERN PACIFIC RAILROAD COMPANY,
UTAH RAILWAY COMPANY,
TOOELE VALLEY RAILWAY COMPANY,
SALT LAKE GARFIELD AND WESTERN RAILWAY COMPANY,
THE OGDEN UNION RAILWAY AND DEPOT COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FROM THE DISTRICT OF UTAH

APPELLANTS' JURISDICTIONAL STATEMENT

CALVIN L. RAMPTON
Counsel of Record for Appellants
721 Continental Bank Bldg.
Salt Lake City, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	5
1. Operating statistics of the railroads	7
2. Comparative interstate and intrastate rates	8
3. Similarity of intrastate and interstate operating conditions	8
4. Economic conditions in Utah	9
ARGUMENT	9
THE PASSENGER DEFICIT	10
TERMINAL COSTS	14
DENSITY	16
COMPARATIVE RATES	18
CONCLUSION	19
PROOF OF SERVICE	21

CASES CITED

Chicago, M. St. P. & P. R. Co. v. Illinois, 355 U.S. 300, 2 L.ed 2d. 292	10
Des Moines & Central Iowa v. Chicago, Burlington & Quincy Railroad Co. et al, 232 I.C.C. Reports 489	14
Interstate Commerce Commission v. Hoboken Manufacturers, 320 U.S. 368, 88 L.ed 107	3

Page

Kansas City Transportation Bureau of Atchison, Topeka & Santa Fe Railway Co., 15 I.C.C. Reports, page 493 15

King v. United States, 344 U.S. 254, 97 L.ed 301 10

Louisiana Public Service Commission v. United States, 348 U.S. 889; 99 L.ed 696; rehearing denied 348 U.S. 921; 99 L.ed 723 3

Mississippi Public Service Commission v. United States, 394 U.S. 908, 99 L.ed 1244 3

Public Service Commission of Utah et al v. United States et al, 356 U.S. 421, 2 L.ed 2d 886; rehearing denied 357 U.S. 933, 2 L.ed 2d 1375 ..... 3, 4, 6, 7, 10

State of North Carolina et al v. United States et al, 350 U.S. 805; 100 L.ed 46 3

United States v. Hancock Truck Lines, et al, 324 U.S. 774; 89 L.ed 1357 3

STATUTES CITED

5 U.S.C.A. 1009 2

28 U.S.C.A. 1253 3

28 U.S.C.A. 1366, 1398, 2284, 2321, 2322, 2323, 2324, 2323 2

49 U.S.C.A. 13(3)(4) 5

49 U.S.C.A. 19(9) 2

APPENDIX

Memorandum Decision 23

Order of Plaintiffs' Motion to Alter or Amend Judgment 39

No.....

In the Supreme Court of the United States

JANUARY TERM, 1961

UTAH CITIZENS RATE ASSOCIATION and STRUCTURAL STEEL & FORGE CO.,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY,
THE WESTERN PACIFIC RAILROAD COMPANY,
UTAH RAILWAY COMPANY,
TOOELE VALLEY RAILWAY COMPANY,
SALT LAKE GARFIELD AND WESTERN RAILWAY COMPANY,
THE OGDEN UNION RAILWAY AND DEPOT COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FROM THE DISTRICT OF UTAH

APPELLANTS' JURISDICTIONAL STATEMENT

COME NOW the appellants above named and in accordance with the provisions of Rule 13(2) of the Rules of the Supreme Court of the United States, submit the following jurisdictional statement in support of their appeal to this court:

A. The opinions issued in this matter by the Court below have not at this time been published in Federal Supplement. The Memorandum Decision and the Order on plaintiffs' Motion to Alter or Amend the Judgment are set forth in full in the appendix hereto.

B. The jurisdiction of this court is evoked upon the following grounds:

1. This was an action brought by the appellants for the purpose of annulling and setting aside an Order of the Interstate Commerce Commission under the provisions of Title 49, U.S.C. 19 (9) and Title 28, U.S.C. Sections 1366, 1398, 2284, 2321, 2322, 2323, 2324 and 2325 and pursuant to Title 5, U.S.C. Section 1009. The action thus commenced was required by the statutory provisions above quoted to be heard and determined by a District Court of three judges.

2. The matter was heard by a District Court of three judges on the 8th day of August, 1960. On the 23rd day of November, 1960 the court issued a Memorandum Decision denying the permanent injunction sought by the appellants and dismissing the action. Thereafter on the 2nd day of December, 1960 the appellants filed a Motion to Alter or Amend Judgment. The court's order on this motion was filed on January 9, 1961. The Memorandum Decision and the Order are set forth in the appendix hereto. As the appellants could not determine from the rules whether the pendency of the Motion to Alter or Amend Judgment stayed the running of the time for appeal, a Notice of Appeal to the Supreme Court of the United States was filed with the United States District Court for the District of Utah on the 16th day of December, 1960, within 30 days of the Memorandum Decision, but before the Order on the Motion to Alter or Amend Judgment. An

additional Notice of Appeal was filed with the United States District Court for the District of Utah on the 11th day of January, 1961.

3. Title 28, U.S.C. 1253 covers jurisdiction of this Court to entertain a direct appeal from such final decree as embodied in the Memorandum Decision.

4. The jurisdiction of this Court to consider such appeal was expressly upheld in the following cases: *United States v. Hancock Truck Lines, et al,* 324 U.S. 774; 89 L.ed 1357; *Interstate Commerce Commission v. Hoboken Manufacturers,* 320 U.S. 368; 88 L.ed 107. Although the question of jurisdiction was not expressly raised or passed upon, the Court in the following recent cases has taken jurisdiction of appeals from such orders: *Louisiana Public Service Commission v. United States,* 348 U.S. 889; 99 L.ed 696, rehearing denied 348 U.S. 921, 99 L.ed 723. *Mississippi Public Service Commission v. United States,* 349 U.S. 908, 99 L.ed 1244; *State of North Carolina et al v. United States et al,* 350 U.S. 805, 100 L.ed 46; *Public Service Commission of Utah et al v. United States of America et al,* 356 U.S. 421; 2 L.ed 2nd 886; rehearing denied 357 U.S. 933; 2 L.ed 2nd 1375.

C. The questions presented by this appeal here are as follows:

1. Were the report and findings of the Interstate Commerce Commission, challenged in the above entitled case, supported by substantial evidence?

2. Does the amendment to Section 13 of the Interstate Commerce Act by the Transportation Act of 1958 authorize the Interstate Commerce Commission to take jurisdiction of and raise Utah intrastate freight rates on the basis of a showing of an overall need for an increase in rates without a showing

evidence, consideration or findings as to whether or not the deficiency in revenue claimed by the carriers arises from the passenger deficit and without any consideration of whether or not freight rates should be required to subsidize the passenger deficit?

3. May the Interstate Commerce Commission and the Court find that conditions incident to transportation of freight in Utah are not more favorable than those incident to interstate transportation between Utah and adjoining states without any showing, evidence, or finding that terminal costs within the state of Utah are not more favorable to the railroads than their system wide terminal costs?

4. May the Interstate Commerce Commission and the Court find that conditions incident to intrastate transportation of freight in Utah are not more favorable than those incident to interstate transportation between Utah and the adjoining states without a showing, evidence, or finding that unit revenue derived from intrastate traffic within the state of Utah is not higher than that derived from interstate traffic of the intervening defendants?

5. Does the evidence introduced by the railroads in this case in regard to density of traffic cure the defects found by the Supreme Court of the United States to exist in the case of *Public Service Commission of Utah v. United States*, 356 U.S. 421?

6. Does the fact that interstate and intrastate freight shipments of the intervening railroads are handled by the same trains, by the same crews, by the same accounting department, and the same traffic department establish that all factors bearing on the reasonableness of intrastate rates are the same as those affecting interstate rates?

7. May it be assumed that interstate and intrastate rates were in proper relationship before the proposed increases?

8. May the Interstate Commerce Commission and the Court ignore the evidence of the protestants which detracts from the weight of the evidence of the railroads?

STATEMENT OF FACTS

In a proceeding entitled, "Increased Freight Rates 1951," which will hereinafter be referred to as Ex Parte 175, the Class 1 railroads of the United States made application to and were granted by the Interstate Commerce Commission authority to increase interstate freight rates and charges by a total of 15%, subject to certain exceptions and hold-downs.

In June of 1951 the Class 1 railways operating within the state of Utah made application to the Public Service Commission of Utah for an increase in intrastate freight rates in the same percentage sought from the Interstate Commerce Commission on interstate rates in Ex Parte 175. After hearing, the Public Service Commission ruled that the railroads had failed to present evidence from which the Commission could determine whether or not the intrastate freight rates of the applicant railroads produced sufficient revenue to provide a fair share of their overall revenue requirements. This order was made "without prejudice to the applicants to apply for further hearing for the presentation of further evidence." The railroads presented no further evidence before the Public Service Commission of Utah but made application to the Interstate Commerce Commisson under the provisions of 49 U.S..C 13(3)(4). Pursuant to this application the Interstate Commerce Commission entered into an investigation of Utah intrastate freight rates under I.C.C. Docket No. 31484. After

hearing on the matter, the Interstate Commerce Commission issued its order directing the railroads to increase their intrastate rates by 15%.

Thereupon the Public Service Commission of Utah and the Utah Citizens Rate Association brought an action in the United States District Court for the District of Utah to annul and set aside the Interstate Commerce Commission order. The district court dismissed the action. An appeal was thereupon taken to the Supreme Court of the United States. The Supreme Court ordered

> "the judgment of the district court is reversed and the cause is remanded to that court with instructions to set aside the order of the Commission and remand the cause to the Commission for further proceedings in conformity with this opinion."
>
> Public Service Commission of Utah v. United States, 356 U.S. 421, 2 L.ed 2d. 886.

While this litigation was pending in the courts, the Interstate Commerce Commission had granted additional freight rate increases interstate to the railroads in two proceedings designated Ex Parte 196 and Ex Parte 206, the Ex Parte 196 increase being 6% and the Ex Parte increase being 12%.

The railroads made application to the Intetstate Commerce Commission under 49 U.S.C. 13 to grant increases on Utah intrastate rates in the same percentages as had been granted on Ex Parte 196 and 206. This proceeding was assigned Docket No. 32253. After the decision of the Supreme Court in *Public Service Commission v. United States et al, supra*, Docket numbers 31484 and 32253 were consolidated and further hearings were had thereon. On December 7, 1959, the Interstate Commerce Commission issued the order which

is here under attack. This order increased the Utah intrastate freight rates and charges, with certain exceptions by 36.5%. The appellants then brought action in the United States District Court for the District of Utah for an injunction setting aside the Interstate Commerce Commission order. At the hearing before the United States District Court for the District of Utah the entire transcript of the proceedings in Docket numbers 31484 and 32253, including exhibits, was introduced in evidence and it was on the basis of this evidence that the parties sought relief. The evidence was substantially the same in nature with some additions as that considered by the Supreme Court and found insufficient in *Public Service Commission of Utah et al v. United States et al, supra.* The additional evidence will be commented on more fully hereinafter.

The evidence falls generally into four categories:

1. Operating statistics of the railroads.

2. Comparative interstate and intrastate rates.

3. Similarity of intrastate and interstate operating conditions.

4. General economic study of Utah.

1. *Operating statistics of the railroads.*

The railroads introduced evidence as to the systemwide operating figures of the roads in question. In the year 1957, the last year for which complete figures were available, Denver & Rio Grande Western Railroad Company showed a rate of return of 8.02%; Southern Pacific Company (which has only a minute amount of Utah intrastate traffic) 4.38%; Union Pacific Railroad Company 5.18%; Western Pacific Railroad Company 4.64%, based upon the Interstate Commerce Commission's elements of value rate bases and eliminating as a

railroad expense income taxes allocable to non-operating income.

Both the railroads and the protestants introduced breakdowns upon certain formulae designed to show a rate of return for Utah operations alone. In regard to these breakdowns, however, the Interstate Commerce Commission stated on page 18 of its order:

> "Since the figures which comprise the starting point for the intrastate and interstate separations are dependent upon train-mile apportionments, the evidence thus submitted by both the respondents and the protestants is unreliable for the purpose intended."

2. *Comparative interstate and intrastate rates.*

The protestants introduced rate studies which show that many intrastate rates without the increases are as high or higher than interstate rates including the increases. The railroads introduced no comparative rate studies based upon like units of traffic, a situation which caused Commissioner Freas in his dissenting opinion in the Interstate Commerce Commission order to state:

> "If it is conceded that intrastate costs here are at least as high as interstate costs for similar traffic units, it is not established that unit revenue derived from the intrastate traffic is not also higher than that derived from interstate traffic."

3. *Similarity of intrastate and interstate operating conditions.*

The railroads introduced several witnesses who testified generally that intrastate and interstate freight was handled on the same cars, over the same rails, by the same platform crews and was accounted for by the same accounting depart-

ment. The protestants introduced evidence which showed that the total density of traffic within the state of Utah was materially higher than the density of traffic systemwide on the railroads in question. The railroads introduced evidence to show that the total Utah traffic was made up of a greater percentage of interstate traffic than intrastate traffic.

The railroads introduced evidence to show that wages of train crews tended to be higher per train mile on intrastate traffic than on interstate traffic.

No evidence was introduced by the railroads as to the similarity of terminal costs as they affect interstate and intrastate traffic.

No evidence was introduced by the railroads regarding the extent to which the alleged deficiency in overall earnings resulted from the passenger deficit rather than from insufficient freight rates.

4. *Economic conditions in Utah.*

Studies introduced by the railroads showed that in recent years the economy of Utah has changed from a primarily agricultural and mining economy to an industrial economy.

ARGUMENT

The principal matters presented to this court by this appeal are:

> A. Does the record on further hearing before the Interstate Commerce Commission supply the deficiencies in evidence found by this court to exist in the railroads' proof in Public Service Commission of Utah v. United States, 356 U.S. 421, 2 L.ed 2d 886.

B. Do the amendments to Section 13 of the Interstate Commerce Act made by the Transportation Act of 1958 relieve the railroads of any of their obligations of proof as established by this court in Public Service Commission of Utah v. United States.

As a preface to discussion of the merits of the case, the Court below stated:

> "The law of the case was established by the decision of the Supreme Court in Public Service Commission of Utah v. United States, supra. This decision remains controlling unless the state of the evidence before the Commission is now significantly different or the application of the Supreme Court's decision has been changed by the 1958 amendments to Section 13(4) of the Interstate Commerce Act, introduced by the Transportation Act of 1958."

These matters have not been previously determined by this court and are important not only to a decision of the instant case, but as a guide to the Interstate Commerce Commission and the state regulatory commissions in the exercise of their respective functions in regard to the establishment of intrastate railroad rates.

THE PASSENGER DEFICIT

In the case of *King v. United States*, 344 U.S. 254, 97 L.ed 301, this court held that the Commission may give weight to deficits in intrastate passenger evenue when prescribing intrastate freight rates under Section 13 of the Interstate Commerce Act. This holding was to some extent modified by *Chicago M. St. P. & P. R. Co. v. Illinois*, 355 U.S. 300, 2 L.ed 2d. 292 and by *Public Service Commission of Utah v. United States, supra.* In the Utah case this court stated in regard to passenger deficits:

> "While a sweeping inquiry into these operations is not required, we believe that in light of our opinion in Chicago M. St. P. & P. R. Co. v. Illinois (U.S.) supra, the findings must reflect consideration of these factors in arriving at a general interstate freight level.

The court then went on to point out that the findings of the Commission did not reflect that they had given any consideration to the passenger deficit as it might affect the railroads overall need for additional revenue.

The same situation prevails in regard to the Commission order of December 7, 1959, issued after the further hearing. The findings in this latter order, which is the order being attacked in this proceeding, are almost identical with the findings in the order set aside in the earlier Utah case. There is nothing on the face of this order or in the findings to indicate that the Commission gave any consideration whatever to the passenger deficit either interstate or intrastate in arriving at its conclusion that intrastate rates were a burden on interstate commerce. So far as can be determined this matter was ignored entirely, even though the evidence brought out by the shippers on cross examination of the railroad witnesses establishes that the roads in question have very large passenger deficits without which they would show an average rate of return of more than 6%.

The railroads took the position, evidently concurred in by the Commission, that the amendments effected by the Transportation Act of 1958 made such a consideration unnecessary.

In its order, the Interstate Commerce Commission on page 3 thereof stated:

> "In addition the court noted an absence in our findings of any indication that we had concerned ourselves with the revenues derived from, or the conditions incl

> dent to, intratstate passenger operations. Subsequent to that decision Section 15(4) of the Act was amended by the Transportation Act of 1958 to provide that we may find unjust discrimination against, or an undue burden on, interstate commerce without a separation of interstate and intratstate property, revenues, and expense, and without considering in totality the operations or results thereof of any carrier or group or groups of carriers wholly within any State * * *

As stated above, the Commission gave no further consideration to the question of passenger deficit. The court below acknowledges that the Commission apparently gave no consideration to passenger operations, but held that the amendment to the act relieved the Commission from such a consideration unless an affirmative showing was made by protestants to the effect that intrastate passenger operations were more favorable than interstate passenger operations. In this regard the court stated:

> "In our opinion the amendment in this area does no more than to obviate the previously determined necessity of affirmative findings or evidence showing that the intrastate passenger deficit is not lower than the interstate or concerning the profitableness of, or circumstances surrounding, segments of intrastate operations with which the Commission was not immediately concerned. The legislative history of the amendment bolsters this view. There is nothing therein inconsistent with the further recognition that to rebut the prima facie presumption resulting from the amendment those who claim intrastate traffic as a whole is not discriminating against interstate commerce may show as an affirmative matter favorable aspects of intrastate operations."

The court reaches this conclusion from a consideration of the languge of the amendment itself, from the conference report on the bill and from the dissenting opinion of Mr.

Justice Frankfurter in the former Utah case to which the conference report makes reference. Counsel for the appellants cannot see anything in any of these three documents which would justify shifting to the protestants in a Section 13 case the burden of showing a difference in passenger operations intrastate and interstate, and relieve the railroads of the obligation of affirmatively proving that conditions are the same or similar.

The language of the amendment seems designed to meet the holding of the Milwaukee case so far as the consideration which must be given by the Commission to the passenger deficit and not to the situation that exists in the Utah case. In the Milwaukee case the railroads were seeking an increase in passenger fares intrastate on a showing that intrastate passenger fares were not yielding their fair share of the revenue requirements, without at the same time showing that overall intrastate traffic was not yielding its fair share of the revenue requriements. The amendment states that a finding as to an individual rate may be made without any finding as to the operations of the railroads within the state in total. The exact opposite of this situation exists in this case. Here the railroads purport to make a showing that the overall Utah intrastate operations are not yielding a fair return and from this the conclusion is reached that this failure results from the insufficiency of the particular segment of the rates on which an increase is sought, i.e. freight rates. This matter is not touched by the amendment either from the wording on its face nor from the discussion in the conference report. It is true that this court held in the King case that the Commission may order the passenger deficit intrastate made up from higher freight rates. However, in the Utah case they held that this is not a matter that should be done automatically but should

be done only after consideration of the passenger deficits and the freight revenues and a finding as to the equities of requiring the freight rates to complement the passenger deficit. The amendment does not change the holding of this court in the Utah case at all in this regard, and the Commission in ignoring the former holding of this court in reliance upon the amendment has committed error which should warrant the vacating of its order.

TERMINAL COSTS

In making proof under the formula set forth in the *King* case, it is the railroads' obligation to show that all material factors bearing upon the reasonableness of rates are substantially the same as affecting both intrastate and interstate rates, or at last not more favorable as to the intrastate rates. There is a complete absence of any such proof in regard to terminal costs intrastate v. interstate, except such breakdown as was incident to the abortive railroad separation, which was rejected by the Commission as being unreliable. All of the operating indications on which the railroads introduced evidence relate only to the over-the-road costs, and none of them to terminal costs.

The Interstate Commerce Commission has often recognized the fact that terminal costs represent a large portion of the railroads' costs. In the case of *Des Moines & Central Iowa v. Chicago, Burlington and Quincy Railroad Company, et al.*, 232 I.C.C. Reports 489, the Commission stated at page 494:

> "Terminal operations are a costly phase of railroad performance. Practical operating men have estimated that 40% of the transportation expense of the carriers is involved in their terminals. Counsel for defendants

observes that this figure is derived from a study by trunk lines railroads and is not based on complainants costs. The records of the carriers show that actually as high as 53.67% of the costs of transportation is represented in terminal costs. This terminal expense includes the cost of intermediate yard services and interchanges as well as the cost at origin and destination terminals."

Furthermore there can be no presumption that intrastate terminal costs in Utah will have the same impact per unit of traffic handled as the systemwide terminal costs of the roads. In fact the presumpton is quite the contrary. In the case of *Kansas City Transportation Bureau v. Atchinson, Topeka & Santa Fe Railway Co.*, 15 I.C.C. Reports 491, at page 493, the Commission stated:

"It cannot be doubted that the terminal expense in a greater center like Kansas City are greater than in a smaller place where terminal work can be done more expeditiously and economically."

In meeting this objection of the plaintiffs below, the appellants here, the District Court stated:

"The point most persistently urged by plaintiffs is that nowhere in the evidence introduced by the railroads is there any evidence to show that terminal costs bear as heavily on intrastate traffic as they do on interstate traffic. It is argued that the cost of maintaining and operating trminal facilities constitutes an important part of railroad expenses, citing Des Moines & Central Iowa v. Chicago, Burlington and Quincy Railroad Company, et al., 232 I.C.C. 489, and that all of the evidence going to similarity of conditions is concerned with the question of over-the-road costs.

"The railroads' response is that interstate terminal costs could not possibly be higher than intrastate terminal costs within Utah; that the latter traffic must of necessity have two terminal costs (origin and desti-

> nation) assigned to it; that interstate traffic would have only one if it originated or terminated in Utah; and bridge traffic moved across Utah would have none at all or, at most, one (where switched between railroads within the state)."

The answer set forth in the opinion to the contention of the plaintiffs below is not germane to the contention at all. Every shipment whether interstate or intrastate has two and perhaps more (in the case of intransit switching) terminal costs. The evidence of the railroads to which the court makes reference above was introduced in regard to the abortive effort to make a separation under the sa-called "North Carolina formula" and has no materiality at all in regard to proof under the *King* case formula, which is the basis upon which the Commission found that Utah intrastate rates were so low as to cast a burden on interstate commerce and the basis upon which the district court upheld that finding.

Again we represent there is no evidence as to similarity of terminal costs which make up from 40% to 55% of the total railroads' costs. In the absence of such evidence the railroads have not shown the similarity of conditions required. As this court stated in *Public Service Commission of Utah v. United States,* supra:

> "This evidence failed to establish that all material factors bearing on the reasonableness of the rates were substantially the same."

DENSITY

When this case was before this court previously, the court considered at some length the evidence in regard to density of traffic. The evidence of the protestants before the Interstate Commerce Commission, the appellants here, is the

same as in the preceding case. It shows that the density of all traffic within the state of Utah is materially higher in regard to each of the roads in question than the density systemwide on the same roads. The railroads have introduced additional evidence here which shows that within the state of Utah the traffic is made up of a greater proportion of interstate traffic than it is of intrastate. The railroads in making this showing have evidently attempted to follow the dissenting opinion of Mr. Justice Frankfurter as to what are the material factors to be shown in a density study. However, even in doing this, they have ignored and failed to show one essential factor that Justice Frankfurter says must be shown in order to give validity to the type of density study which they introduced. The dissenting opinion stated:

> "There is some, although less, probative value in a comparison between the density of interstate traffic confined to interstate traffic within the state and the density of intrastate traffic. For this comparison to be reliable, density of interstate traffic for the entire region for which the interstate rates have been set must be assumed to be substantially the same as the density of interstate traffic within the state."

There is shown by the railroads' study a comparison between the density of interstate traffic confined to interstate traffic within the state and the density of intrastate traffic. There is, however, no showing anywhere that density of interstate traffic for the entire region is substantially the same as the density of the interstate traffic within the state. Nor can such a presumption be indulged in, for the evidence definitely shows that the interstate traffic within Utah is materially heavier than the interstate traffic systemwide, and also that the intrastate traffic within Utah is materially heavier than intrastate traffic in other states in the region in which

the respondent carriers operate. It is submitted, therefore, that the railroads have introduced no evidence at all which would warrant a departing from the former finding of this court to the effect that the evidence fails to establish a similarity of conditions intrastate and interstate which warrant the application of the *King* case formula.

COMPARATIVE RATES

In order to show a discrimination against interstate commerce under the formula in the *King* case, it is necessary that the railroads show that the intrastate rates are not already as high or higher without the increases than are the interstate rates with the increases. This the railroads did not do, a fact which caused Interstate Commerce Commissioner Freas to dissent from the decision in the following language:

> "I am unable to agree with the conclusions of the majority to the extent that increases are prescribed.
>
> "If it is conceded that intrastate costs here are at least as high as interstate costs for similar traffic units, it is not established that unit revenue derived from the intrastate traffic is not also higher than that derived from interstate traffic."

The railroads introduced a number of exhibits, Exhibit 7CR through 20CR, showing the yield of various representative shipments both intrastate and interstate. Reducing these examples to a revenue per mile basis, this study shows that in the great majority of cases the car mile earnings on the intrastate rates are substantially higher without any increases than are the car mile earnings on the interstate rates including all of the ex parte increases.

On page 17 of the Interstate Commerce Commission order is a schedule showing in regard to systemwide operations

of the railroads and Utah operations the ton mile revenue and the ton mile expenses. This scale shows that in the year 1957 Utah operations without the increase on intrastate rates show a greater excess of revenue over costs than do systemwide operations with most of the increases in effect.

The figures break down as follows:

	Excess of Revenue over costs per ton mile (c)	
	Total Utah	Total System
Denver & Rio Grande	.59	.60
Southern Pacific	.69	.44
Union Pacific	.55	.51
Western Pacific	.48	.46

In light of these figures, it is difficult to see how Finding No. 3 of the Commission to the effect that intrastate rates and charges are lower than interstate can be sustained.

CONCLUSION

We do not ask the court to weigh the evidence in this case. We will concede that where there is substantial evidence to support the findings even though the evidence to the contrary may appear to be the more compelling, the court should support the Commission's order.

It will not require this court to examine the large volume of evidence before the Interstate Commerce Commission. It will merely require that the appellees refer in the record to any evidence on the reopened hearing which corrects the deficiencies previously found by this court to exist.

It is the contention of the appellants that the amendment to Section 13 effected by the Transportation Act of 1958 made

no substantial change in the law, but merely codified previously existing decisions of this court. On the other hand, it appears to be the intention of the railroads, sustained by the Interstate Commerce Commission and the court below that these amendments have obviated the necessity of proof. If the law is now, in light of these amendments, as the railroads contend, there is little need for the continued existence of state regulatory bodies so far as the regulation of rail rates is concerned. Under the theory of the railroads, in the ex parte interstate increase cases, the Commission may, on the basis of general nationwide evidence prescribe a uniform amount of increase not only for the different regions and different railroads having different revenue requirements on an interstate basis, but within each state on the intrastate rates where logic and reasoning must tell everyone that the situation so far as the revenues and costs of the carriers must differ greatly.

Uniformity of increase in rates might be desirable if all rates were on an equitable relationship prior to the increase and if the operating conditions of all railroads as affecting all types of rates were the same. Uniformity of increase, however, which ignores these factors not only does an injustice to the shippers, but does violence to the fundamental division of power between the state and federal governments.

Respectfully submitted,

CALVIN L. RAMPTON
Counsel of Record for Appellants
721 Continental Bank Bldg.
Salt Lake City, Utah

PROOF OF SERVICE

I, CALVIN L. RAMPTON, attorney for the appellants herein and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the ..... day of February, 1961, I served copies of the foregoing Jurisdictional Statement of Appellants on the several parties thereto as follows:

1. On the United States, by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah, at Room 200 Federal Building, Salt Lake City, Utah, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D.C., and to Robert A. Bicks, Acting Assistant Attorney General, Department of Justice, Washington, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope with air mail postage prepaid, to Robert W. Ginnane, Esq., Gen. Counsel, and to Charles H. Johns, Assistant Counsel, at the offices of the Commission, Washington 25, D.C.

3. On the intervening defendants by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective counsel of record as follows:

To:

Bryan P. Leverich, Esq.
A. U. Miner, Esq.
Union Pacific Annex
Salt Lake City, Utah

Elmer B. Collins, Esq.
Union Pacific Railroad
1416 Dodge Street
Omaha, Nebraska

L. W. Hobbs, Esq.
Union Pacific Railroad
1416 Dodge Street
Omaha, Nebraska

Ernest Porter, Esq.
Rio Grande Bldg.
Denver, Colorado

Albert R. Bowen, Esq.
Deseret Bldg.
Salt Lake City, Utah

S. N. Cornwall, Esq.
65 So. Main
Salt Lake City, Utah

Walter G. Treanor, Esq.
Western Pacific Railroad
526 Mission Street
San Francisco 5, Calif.

CALVIN L. RAMPTON
721 Cont'l Bank Bldg.
Salt Lake City, Utah
Attorney for Appellants

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CIVIL NO. C-58-60
MEMORANDUM DECISION

UTAH CITIZENS RATE ASSOCIATION, and STRUCTURAL STEEL & FORGE CO.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY, UTAH RAILWAY COMPANY, TOOELE VALLEY RAILWAY COMPANY, SALT LAKE GARFIELD AND WESTERN RAILWAY COMPANY, THE OGDEN UNION RAILWAY AND DEPOT COMPANY,
Intervening Defendants.

Calvin L. Rampton, Esquire, (Pugsley, Hayes, Rampton & Watkiss) Salt Lake City, Utah, for plaintiffs.

John H. D. Wigger, Esquire, (Robert A. Bicks, Esquire, and A. Pratt Kesler, Esquire, with him on the briefs) for the defendant, United States of America.

C. H. Johns, Esquire, Associate General Counsel, Interstate Commerce Commission, (Robert W. Ginnane, Esquire, General Counsel, with him on the briefs) for the defendant Interstate Commerce Commission.

A. U. Miner, Esquire, and L. W. Hobbs, Esquire, (Bryan P. Leverich, Esquire, Elmer B. Collins, Esquire, Ernest P. Porter,

Esquire, Albert R. Bowen, Esquire, Arthur A. Allen, Esquire and S. N. Cornwall, Esquire, with them on the briefs) for the intervening defendant carriers.

Before LEWIS, Circuit Judge, and CHRISTENSON and CHILSON, District Judges.

CHRISTENSON, District Judge.

Plaintiffs, pursuant to procedure prescribed in 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, seek by this action to have set aside an order of the Interstate Commerce Commission which requires the railroads operating in Utah to increase, with certain exceptions, Utah intrastate freight rates in correspondence with increased interstate rates approved by the Commission in three nationwide revenue proceedings designated as Ex Parte Nos. 175, 196 and 206.

Two principle questions are presented for determination by this Court: (1) whether plaintiffs in the present proceedings have standing to question the validity of the findings and order of the Commission; and if so, whether such findings and order are supported by substantial evidence.

Interstate freight rates were increased nationwide by the Interstate Commerce Commission in its Ex Parte No. 175, 284 I.C.C. 589, 280 I.C.C. 179, 281 I.C.C. 557. The Public Service Commission of Utah refused to allow similar increases on intrastate traffic. A Thirteenth Section investigation and hearing were conducted by the Interstate Commerce Commission upon which it issued a report, 297 I.C.C. 87, and later an order, directing that intrastate freight rates in Utah be increased to comport with increases granted interstate in Ex Parte No. 175. This order was sustained by a three-judge court in this district, *Public Service Commission of Utah v. United States*, D.C. Utah 1956, 146 F.Supp. 803. On May 19,

1958, the Supreme Court of the United States on appeal reversed. *Public Service Commission of Utah v. United States*, 1958, 356 U.S. 421, 78 S.Ct. 796, 2 L.Ed. 886. Pursuant to the mandate, it was thereupon directed by this Court that the Commission's order be set aside and that the cause be remanded to the Interstate Commerce Commission for further proceedings in conformity with the Supreme Court's opinion.

In the meantime, in Ex Parte No. 196, 298 I.C.C. 279, and again in Ex Parte No. 206, 299 I.C.C. 429 and 300 I.C.C. 633, the Interstate Commerce Commission authorized additional rate increases on interstate traffic. A further Thirteenth Section investigation was instituted and administrative hearings were held. The Commission, on December 7, 1959, issued its report in the combined proceedings (Docket Nos. 31484 and 32253) in which it allowed the Public Service Commission of Utah thirty days in which to approve the increases held required to remove the burden upon interstate commerce. Within this time the Public Service Commission of Utah notified the Interstate Commerce Commisison that it would not enter such an order. The Utah Citizens Rate Association filed a petition for rehearing and reconsideration with the Interstate Commerce Commission. On March 17, 1960, the Commission issued it. order, assailed in this proceeding, denying the petition for rehearing and reconsideration, and requiring the railroads to establish, effective May 13, 1960, the increased rates and charges for intrastate transportation within the State of Utah in accordance with the findings contained in its report.

Utah Citizens Rate Association initially brought this action as sole party plaintiff. Its capacity and standing to raise the issue here involved were questioned by the defendants. We granted leave to the Association to join as a party plaintiff. Structural Steel and Forge Company, a substantial shipper in

Utah intrastate commerce. Defendants assert that even with this addition, the plaintiffs have no legal standing to maintain this action to set aside a general revenue order of the Commission.

Lack of statutory capacity to sue may disempower an association from maintaining such an action as this. *Moffat Tunnel League v. United States*, 1933, 289 U.S. 113, 53 S.Ct. 543, 77 L.Ed. 1069. Neither the general capacity to sue and be sued vested in the Utah Citizens Rate Association as a non-profit corporation by Utah Code Annotated 1953, §§16-6-1, 16-6-8, nor its statutory authorization to appear as a party or to intervene herein by virtue of 28 U.S.C. § 2323, affords standing for it to maintain an action to enjoin the Commission's order. *Pittsburgh & W. Va. Ry. v. United States*, 1930, 281 U.S. 479, 50 S.Ct. 378, 74 L.Ed. 980, and *Alexander Sprunt & Son, Inc. v. United States*, 1930, 281 U.S. 249, 50 S.Ct. 315, 74 L.Ed. 832; *cf. Chicago Junction Case*, 1924, 264 U.S. 258, 267-268, 44 S.Ct. 317, 320, 68 L.Ed. 667, and *Merchants' & Manuf. Traffic Ass'n v. United States*, 231 F. 292, reversed other grounds, 1916, 242 U.S. 178, 37 S.Ct. 24, 61 L.Ed. 233. This is for the reason that it possesses no legal right or interest that would be injuriously affected by the order.

The reason and result, however, do not pertain to plaintiff Structural Steel and Forge Company. The distinction is clearly established in *Alexander Sprunt & Son v. United States*, supra, in which the following cases allowing the maintenance of similar actions by those directly affected are distinguished by the court in connection with its denial of relief to parties with only an indirect or sentimental interest. *United States v. Village of Hubbard, Ohio*, 1925, 266 U.S. 474, 45 S.Ct. 160, 69 L.Ed. 389; *The Chicago Junction Case*, supra; *Skinner & Eddy Corporation v. United States*, 1919, 249 U.S. 557, 39 S.Ct. 375, 63

L.Ed. 772; *Interstate Commerce Commission v. Diffenbaugh*, 1911, 222 U.S. 42, 32 S.Ct. 22, 56 L.Ed. 83. In the last cited cases standing was recognized on the part of shippers or others directly affected by the orders of the Commission. Compare *Jersey City v. United States*, D.C.N.J. 1950, 101 F. Supp. 702, pressed upon us by the defendants, where Judge Marris, for the Court, pointed out that the plaintiff had not shown that any of its rights as a municipal corporation would be adversely affected by the Commission's order. Moreover, the foundational power to adopt and enforce statewide revenue orders affecting intrastate rates is involved. See *Skinner & Eddy Corporation v. United States*, supra; and the *Utah* rate case. To deny the standing of a shipper to be heard as to the validity of the Commission's order would do violence to the very base of constitutional government, the power of those directly aggrieved by claimed illegal action to be able to invoke judicial power against it.

We conclude that the plaintiff shipper has standing to maintain this action under the party in interest criterion of 28 U.S.C. § 2323 and under the person adversely affected or aggrieved standard of § 10(2) of the Administrative Procedures Act, 5 U.S.C. § 1009(a). See *American Trucking Assns. v. U.S.*, 1960, 364 U.S. (1); *Garden City Floral v. United States, D.C.* Mont. 1956, 143 F.Supp. 609

What already has been said largely disposes also of the question of the exhaustion of administrative remedies raised by the defendants The so-called saving clause in the Commission's order,(1) asserted by the defendants as the appro-

(1) "The foregoing findings relate to Utah intrastate rates generally, and are without prejudice to reexamination, upon complaint or otherwise, as to the lawfulness of any individual Utah intrastate rate on any particular commodity."

priate and only remedy open to plaintiffs, is not applicable where the validity of the entire state-wide revenue order is called into question on jurisdictional grounds. In this position, as in our sustaining of the shippers standing to raise the question, the procedurally parallel case of *Garden City Flora. v. United States*, supra, supports us, although we doubt that the Association itself would have standing to raise the question. The following cases primarily relied upon by defendant to demonstrate that "the plaintiffs have mistaken their remedy in the statutory scheme of railroad rate-making," and that they should await a more appropriate occasion to complain pursuant to the saving clause of the order, are not in point: *Georgia Public Service Commission v. United States*, 1951, 283 U.S. 765, 51 S.Ct. 619, 75 L.Ed. 1397; *Algoma Coal & Coke Co. v. United States*, D.C. Va. 1935, 11 F.Supp 487; and *Koppers Company v United States*, D.C. Pa. 1955, 132 F. Supp. 159. *Algoma* and *Koppers* involved merely permissive rates on selected commodities in interstate commerce. In *Georgia*, language quoted by the defendants does indeed indicate that the plaintiffs there would not be heard to attack a statewide order governing "a vast multitude of rates" (even though among the plaintiffs there was the Georgia Public Service Commission as well as intervening shippers). But the attack, so procedurally rejected, was upon the basis of "possible uncertainty of application in isolated instances." (P. 622 of 51 S.Ct.) On the other grounds on which the order was assailed, including claimed insufficiency of the findings and evidence to show undue prejudice to interstate shippers by intrastate rates, no question was raised by the Court as to the standing of the plaintiffs. We thus reach the merits of the controversy.

The law of the case was established by the decision of

the Supreme Court in *Public Service Commission of Utah v. United States*, supra. This decision remains controlling unless the state of the evidence before the Commission is now significantly different or the application of the Supreme Court's decision has been changed by the 1958 amendments to Section 13(4) of the Interstate Commerce Act, introduced by the Transportation Act of 1958, P.L. 85-625, 85th Cong., 49 U.S.C. 13(4).

In reversing our prior decision, the Supreme Court said that the order of the Commission was vulnerable in the following respects:

1. As to the finding that the prevailing intrastate rates were abnormally low and failed to contribute a fair share of over-all revenue, there was no positive evidence before the Commission to indicate the relative costs and expenses of the intrastate as against interstate shipments.

2. There was no substantial evidence to support the finding that intrastate conditions were not more favorable than those incident to interstate transportation.

3. There was an absence in the findings of any indication that the Commission concerned itself with the revenues and conditions relative to intrastate passenger operations.

Shortly after the Supreme Court's decision, § 13(4) of the Act was amended by the addition of the portions underlined (49 U.S.C. § 13(4)):

> "§13, par. (4) Duty of Commission where State regulations result in discrimination. Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the

> one hand, and interstate or foreign commerce on the other, or any undue, unreasonable, or unjust discrimination against, *or undue burden on*, interstate or foreign commerce (*which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State*), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, *or burden*. . . ."

The addition of the phrase, "or undue burden on" adds nothing to the existing law but amounts merely to a codification of language used in prior court decisions. As early as 1931 the Supreme Court in *Georgia Public Service Comm. v. United States*, supra, used the phrase, "undue burden" interchangably with, or in apposition to "unjust discrimination." 283 U.S. 765, 773, 51 S.Ct. 619, 622, 75 L.Ed. 1397.[2] And the Court in its 1958 decision in the *Utah* rate case stated, "Federal power exists in this area . . . when . . . those rates

---

(2) We can find little basis in the decisions for doubt alluded to in the Conference Report referring to this part of the amendment. Itwas said: "The first amendment is the insertion of the words 'or undue burden on' in the present language describing the protection extended to interstate commerce. The addition of these words would serve to remove any doubt as to the Commission's power in instances where, upon appropriate records, it finds, as it has done in some section 13 proceedings, that the burden case upon interstate commerce by intrastate rates or charges is undue and therefore unjustly discriminatory. Such findings have been questioned in the courts. This proposed change would thus afford the Commission additional statutory support needed in the administration of section 13." Conference Report No. 2274, July 24, 1958 (to accompany S. 3778), 1958 U.S. Code Cong. & Admin. News, 85th Cong., 2nd Sess., Vol. 2, p. 3484.

cast an undue burden on interstate commerce." (Citing § 13(4) as it stood prior to the 1958 amendment.) 356 U.S. 421, 425.

The parenthetical addition, relating to the method of determination by the Commission of undue burden or discrimination, is also partly a codification of prior decisional law. The phrase "which the Commission may find without a separation of interstate and intrastate property, revenue and expenses," is merely permissive and reflects the procedure approved by the Supreme Court in such cases as *King v. United States*, 1952, 344 U.S. 254, 73 S.Ct. 259, 97 L.Ed. 301; *Illinois Commerce Comm. v. United States*, 1934, 292 U.S. 474, 54 S.Ct. 783, 78 L.Ed. 1371; and *Georgia Public Serv. Comm. v. United States*, supra.

The next phrase, "without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State," could mean simply that in a revenue case such as this the Commission need not investigate specific rates as it would in a rate case. If understood in this way only a further codification of existing law would be involved. However, defendants contend that the amendment means in its wide ambit that the Commission may find despite any affirmative indication to the contrary that a segment of intrastate rates represents an ultimate "burden" upon interstate commerce without reference to the question of whether intrastate rates generally make it such a burden. Thus broadly interpreted, the amendment not only would overrule the Supreme Court's decision in *Chicago, St. P. & P. R. Co. v. Illinois*, 1958, 355 U.S. 300, 78 S.Ct. 304, 2 L.Ed. 2d 292, as reaffirmed in the *Utah* rate case, supra, but might permit the entire field of rate regulation to be federally arrogated by a separate treatment of segments unrelated to the net or

total effects. The result could follow, as apprehended by plaintiffs here, that intrastate transportation generally would be required to subsidize interstate transportation as far as overall operations are concerned. Indeed, Mr. Justice Frankfurter, in his dissenting opinion in the *Utah* case recognized the problem and acknowledged the possible result (P. 459 of 356 U.S.):

> "There is no apparent reason why a lower passenger deficit, like any other favorable circumstance surrounding intrastate transportation, would not justify a lower rate on intrastate freight traffic. If intrastate traffic taken as a whole contributes its fair share to needed revenues and does not, from a revenue standpoint, discriminate against interstate commerce, what justification can there be for a finding of discrimination that is possible only because a segment of intrastate traffic is considered in isolation? Raising rates in this situation may have the effect of compelling intrastate commerce to contribute more than its fair share."

But he added:

> "It does not necessarily follow that the Commission should be required to make findings, supported by evidence in the record, that the intrastate passenger deficit is not lower than the interstate, or about the profitableness of, or circumstances surrounding, any segment of intrastate operations with which it is not immediately concerned. Indeed, the consequences that follow in the train of such a requirement demonstrate that it exalts formal consistency over sound policy. In the first place, if the Commission must determine the profitableness of intrastate passenger operations, it will of course be compelled to segregate revenues and costs attributable to intrastate and interstate traffic. Yet it is precisely this that in Illinois Commerce Comm'n v. United States, 292 U.S. 474, and the King case we said, urged on by the difficulty of accurate allocation, was not required when interstate and intrastate traffic were mingled together."

We believe that a matter of procedure rather than any substantive change in the basic transportation policy of the Congress is involved. If this were not so, serious conceptual and constitutional, and further practical difficulties, would be invited. But there seems no reason why Congress cannot provide or clarify a procedural factor to render more practical the formula it has theretofore established, and which was, under existing law appropriately considered by the majority in the *Utah* rate case. In our opinion the amendment in this area does no more than to obviate the previously determined necessity of affirmative findings or evidence showing that the intrastate passenger deficit is not lower than the interstate or concerning the profitableness of, or circumstances surrounding, segments of intrastate operations with which the Commission was not immediately concerned. The legislative history of the amendment bolsters this view.(3) There is nothing therein

(3) Statement of the managers on the part of the House in the Conference Report, 1958 U.S. Code Cong. & Admin. News, 85th Cong., 2nd Sess., Vol. 2, p. 3484-85:

"The second amendment is the insertion of the following words: (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State).

With this amendment, in order to exercise its jurisdiction over intrastate rates, the Commission still must find that such rates cause undue, unreasonable, or unjust discrimination against, or undue burden on interstate commerce. The amendment deals only with the nature of the evidence to support such a finding. By two recent decisions of the Supreme Court (Chicago, Milwaukee, St. Paul and Pacific Railroad Co. v. State of Illinois (January 13, 1958), 355 U.S. 300, 356 U.S. 906, 78 S.Ct. 304, 665, and Public Service Commission of Utah v. United States (May 19, 1958), 356 U.S. 421, 78 S.Ct. 796, 2 L.Ed.2d 886), the Commission is required to consider the entire State operation, freight and passenger, in determining whether or not the intrastate freight rates were causing an undue revenue discrimination against inter-

(Continued on next page)

inconsistent with the further recognition that to rebut the prima facie presumption resulting from the amendment those who claim intrastate traffic as a whole is not discriminating against interstate commerce may show as an affirmative matter favorable aspects of intrastate operations. The dissenting opinion to this effect[4] referred to the then pending bill

---

(Continued from preceding page)

state commerce. If the holdings in these cases mean that the required findin[illegible] of—

> undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce—

can be made only in the light of the overall statewide totality of a carrier's operating results derived from its entire body of rates applicable within the State, it would preclude the Commission from making such a finding on a showing of only the effect of the particular rate or rates in question. The Commission could not, under such an interpretation, continue to function effectively in removing unjust discrimination against interstate commerce caused by intrastate rates and charges.

Rather than the amendment causing a change, it is the possible interpretation of these recent court decisions that would create a change in the present regulatory scheme. As stated in the dissenting opinion (of four justices) in the Utah case, a consequence of the decisions—

> "would be a radical, and in all likelihood unworkable change in the way the Commission has administered the provisions of section 13(4) for over 35 years."

(4) Dissenting Opinion, pp. 462 of 356 U.S.:

> "Of course, those who contend that intrastate traffic as a whole is not discriminating against interstate traffic may come forward and show, as they may in respect to any claimed dissimilarity of conditions surrounding interstate and intrastate traffic, some favorable aspect of intrastate operations that the Commission should take into account. In the absence of such a showing, however, the Commission should be able to assume that discrimination shown to exist as to the particular segments of intrastate and interstate traffic with which the § 13(4) proceeding is concerned is not offset by other conditions that this Court speculates may affect wholly different segments of intrastate commerce. The record in the present case is devoid of the remotest suggestion that the

(Continued on next page)

couched in the same language as that later adopted in the Transportation Act of 1958,[5] and the Committee, considering the pending legislation, cited the dissenting opinion with apparent approval. Mr. Justice Frankfurter's position on the point therefore should be accepted as persuasive.

As thus interpreted, we perceive no constitutional problem. And we must conclude that the absence in the findings of an indication that the Commission concerned itself with the revenues and conditions relative to intrastate passenger operations does not render the present order vulnerable. There was no affirmative showing by the plaintiffs, or at all, that such revenues and conditions would have altered the burden upon interstate commerce found to have existed from a consideration by the Commission of revenues and conditions pertaining to the freight component.

(Continued from preceding page)

> Utah intrastate passenger deficit is any less than the interstate passenger deficit, and the Commission should not be required to seek out such evidence itself and make findings beyond those it has already made.
>
> "This is a solution that accommodates imponderables and does not demand precision where the nature of the subject can yield only approximations. It is a solution responsive to the difficult regulatory problems posed by § 13(4). Embedded in it are some of the advantages in simplicity of administration that would follow if this Court had expanded, as it might well have done, the doctrine of discrimination against persons or localities to permit statewide orders protecting all interstate shippers against discrimination without reference to revenues. At the same time, there remains an opportunity for intrastate shippers or a state commission to show to the Interstate Commerce Commission's satisfaction the existence of specific factors favoring intrastate traffic in general that should not wisely be ignored. It is the solution that seems best designed to achieve the purposes of the Act without interposing insurmountable obstacles to the effective regulation of the national transportation system, the responsibility for which rests after all, predominantly with the Interstate Commerce Commission.

(5) See footnote 3, and pages 460-461 of 356 U.S.

With reference to the other two points on which the Supreme Court in the *Utah* rate case held the evidence to be insufficient, we have carefully examined the record before the Commission and believe that the prior deficiencies have been corrected within the law of the case. The point most persistently urged by plaintiffs is that nowhere in the evidence introduced by the railroads is there any evidence to show that terminal costs bear as heavily on intrastate traffic as they do on interstate traffic. It is argued that the cost of maintaining and operating terminal facilities constitutes an important part of railroad expenses, citing *Des Moines & Central Iowa v. Chicago, Burlington and Quincy Railroad Company, et al.*, 232 I.C.C. 489, and that all of the evidence going to similiarity of conditions is concerned with the question of over-the-road costs.

The railroads' response is that interstate terminal costs could not possibly be higher than intrastate terminal costs within Utah; that the latter traffic must of necessity have two terminal costs (origin and destination) assigned to it; that interstate traffic would have only one if it originated or terminated in Utah; and bridge traffic moving across Utah would have none at all or, at most, one (where switched between railroads within the state).

Beyond these latter circumstances, and the general evidence tending to show that conditions affecting intrastate traffic were not more favorable than those pertaining to interstate traffic, density of traffic studies are now more convincing in favor of the carrier's position. Additional specific data and new comparative ratios have been presented by them which include terminal costs in the evaluated factors. And the record heretofore held to be deficient has been otherwise strengthened. In combination, these considerations have led us to conclude

that the Commission's present order is not vulnerable to this focused attack, nor to the other objections now urged by plaintiffs.

Other matters urged in the briefs are deemed not sufficient to require special discussion here or to impair the action of the Commission.

We conclude that the plaintiffs' complaint should be, and it is hereby, dismissed. The defendant carriers are released from the protective order with respect to the impounding of revenue from the disputed increases. Defendants are awarded their taxable costs herein.

/s/ A. SHERMAN CHRISTENSON
United States District Judge

/s/ HATFIELD CHILSON
United States District Judge

LEWIS, Circuit Judge, concurring:

I am in complete agreement with the views expressed in my brother Christenson's opinion relating to the merits of this case and with the result. However, I do not share the confidence expressed that the action may be maintained at the instance of a single shipper and deem it desirable to reserve an expression of my views upon that important question until such time as the point may be determinative.

/s/ DAVID T. LEWIS
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CIVIL NO. C-58-60

ORDER ON PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT

UTAH CITIZENS RATE ASSOCIATION, and STRUCTURAL STEEL & FORGE CO.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY, UTAH RAILWAY COMPANY, TOOELE VALLEY RAILWAY COMPANY, SALT LAKE GARFIELD AND WESTERN RAILWAY COMPANY, THE OGDEN UNION RAILWAY AND DEPOT COMPANY,
Intervening Defendants.

Before LEWIS, Circuit Judge, and CHRISTENSON and CHILSON, District Judges.

The plaintiffs have filed a timely motion to alter or amend the judgment contained in our memorandum decision herein (a) to grant judgment to the plaintiffs as prayed for in the complaint, setting aside and declaring null and void the order of the Interstate Commerce Commission dated March 17, 1960, in I.C.C. Docket Nos. 32484 and 32253, and (b) to require the defendants to hold intact moneys heretofore im-

pounded under the order of this court in this action, dated May 11, 1960, until such time as the parties may have exhausted their remedies by appeal or until the time for taking an appeal shall have expired.

Memoranda in support of, and in resistance to, this motion have been filed by counsel for the respective parties; and on December 20, 1960, they stipulated in writing the motion could be deemed submitted upon these memoranda and without oral argument.

On May 11, 1960, upon plaintiffs' application for a temporary injunction and its denial, but as a part of the order of denial, this Court said:

> "It is further ordered, however, that the intervening railroads . . . shall keep separate the increased amounts of moneys received by them through the application of the increased freight rates involved herein pending the determination of the merits by the Court of the question of a permanent injunction against the enforcement of the Interstate Commerce Commission order allowing such increases, and shall impound said moneys in separate bank accounts of the respective railroads to be accounted for and held subject to the order of this Court pending final determination of all matters involved herein, including final decision of the United States Supreme Court in the event of an appeal, such funds thereafter to be distributed to such shippers as may be determined by this Court to be entitled thereto in the event final judgment be such as to vacate and annul the said order or any subsequent order of the Interstate Commerce Commission insofar as they increase intrastate freight rates within the State of Utah here involved, otherwise to be returned to said railroads.
>
> "The Court hereby retains jurisdiction for the purpose of making any necessary orders with respect to

refund to shippers or to direct that impounded moneys be returned to the railroads."

The foregoing provision was based substantially upon the proposal of the railroads which they suggested as an alternative to the Court's granting the temporary restraining order prayed for by the plaintiffs.

In our decision and judgment we said:

"We conclude that the plaintiffs' complaint should be, and it is hereby, dismissed. The defendant carriers are released from the protective order with respect to the impounding of revenue from the disputed increases . . ."

This disposition was not intended to, and could not properly, alter the previous order which was based upon the railroad's proposal, with respect to the moneys impounded up to the date of the Court's judgment. To remove uncertainty in this respect, the last paragraph of the Court's decision and judgment is amended to read as follows:

"We conclude that the plaintiffs' complaint should be, and it is hereby, dismissed upon the following conditions. The defendant carriers are released from the protective order with respect to impounding future revenues from disputed increases. The funds from such increases impounded pursuant to the order of the Court dated May 11, 1960, and received prior to November 23, 1960, the date of the filing of the judgment herein, shall continue to be held and impounded by said railroads in separate bank accounts and shall be accounted for and held subject to the order of this Court pending final determination of all matters involved herein, including final decision of the United States Supreme Court in the event of an appeal, such funds thereafter to be distributed to such shippers as may be determined by this Court to be entitled

thereto in the event final judgment be such as to vacate and annul the said order or any subsequent order of the Interstate Commerce Commission insofar as it increases the intrastate freight rates here involved within the State of Utah, otherwise to be returned to said railroads. Defendants are awarded their taxable costs herein."

Except as above specifically provided, the Court's decision and judgment as heretofore filed shall be and remain in full force and affect, and as so modified shall constitute the judgment of this Court.

Some question has arisen as to the power of this court to make the foregoing correction by reason of the filing by the plaintiffs of notice of appeal from our original judgment after the filing of the motion to alter and amend the judgment. It is generally considered that an appeal when properly perfected divests the trial court of jurisdiction of the case. But this principle has not been extended to preclude the correction of the record so that the proceedings as they actually occurred are properly set forth. 3 Am. Jur. Appeal and Error, §5[illegible], p. 193; Rule 60(a) F. R. Civ. Proc.; see *Greenburg v. Arsenal Bldg. Corp.*, 2nd Cir. 1944, 144 F. 2d 292 (provision for interest thought to be implicit in judgment could be added after appeal), rev'd on other grounds 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296. In *Hovey v. McDonald*, 1883, 109 U.S. 150, 3 S.Ct. 136, 27 L.Ed. 888, the Supreme Court said that a correction of the form of a decree after appeal by adding a direction to a receiver to pay over money in his hands which he had been restrained from paying over by an injunction during the pendency of the suit was not invalid, because that was a "thing of course," in view of the record in the case. And about the same may be said of the foregoing amendment. If the present motion to amend the court's order in respect to

impounded funds is regarded as a motion under Rule 60(a), supra, as well it may be, our action would come within its express provision that such amendment can be made, notwithstanding the pendency of an appeal, at any time prior to the docketing of the case on appeal. Since the record on appeal has not been certified, it is apparent that the case has not been docketed. See Supreme Court Rule 13. Moreover, the continued protection to the plaintiffs, pending appeal, in accordance with the pre-existing direction of the court may be considered in the nature of a stay within the spirit of the Revised Rules of the Supreme Court, Rules 18 and 51(2) which encourage stay applications to be made in the first instance to the courts below. See *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Com'n.*, 1922, 260 U.S. 212, 43 S.Ct. 75, 67 L.Ed. 217, where only one Judge signed the order, but the power of the lower court otherwise was not denied. The fact that the railroads themselves initially proposed this very continuing provision may be deemed a waiver of a supersedeas bond.

Finally, it seems doubtful that our judgment was appealable because of lack of finality in view of the present intervening motion. See Fed. R. Civ. Proc. 59(e), 73; see also 28 U.S.C. §2284(5); cf. 28 U.S.C. §1253.

Dated this 6th day of January, 1961.

BY THE COURT

DAVID T. LEWIS
Circuit Judge

A. SHERMAN CHRISTENSON
District Judge

HATFIELD CHILSON
District Judge

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 9 1960
JAMES R. BROWNING, Clerk

No. 712

In the Supreme Court of the United States

October Term, 1960

UTAH CITIZENS RATE ASSOCIATION AND STRUCTURAL STEEL AND FORGE COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY, UTAH RAILWAY COMPANY, TOOELE VALLEY RAILWAY COMPANY, SALT LAKE GARFIELD AND WESTERN RAILWAY COMPANY, THE OGDEN UNION RAILWAY AND DEPOT COMPANY, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION TO AFFIRM

A. U. Miner
Counsel of Record for Railroad Appellees
404 Union Pacific Bldg.
Salt Lake City, Utah

L. W. Hobbs
Bryan P. Leverich
Ernest P. Porter
Albert R. Bowen
S. N. Cornwall
Attorneys for Railroad Appellees.

TABLE OF CONTENTS

	Page
STATEMENT	2
QUESTION PRESENTED FOR REVIEW	5
SUMMARY OF ARGUMENT	5
ARGUMENT	8
COMPARATIVE OPERATING CONDITIONS AND COSTS	5, 9
TRAFFIC DENSITY	6, 14
OPERATING RATIOS	7, 18
TERMINAL COSTS	7, 19
PASSENGER DEFICIT	8, 20
COMPARATIVE RATES	8, 24
CONCLUSION	30

CASES CITED:

California Intrastate Freight Rates and Charges, 302 I.C.C. 189	26
Chicago Intrastate Suburban Fares of Milwaukee Railroad, 305 I.C.C. 73	19
Chicago M. St. P. & P. R. Co. v. Illinois, 355 U.S. 300, 2 L. Ed. 2d 292	21
Class and Commodity Rates to Florida, 142 I.C.C. 151	26
Emergency Freight Rates 1935, 213 I.C.C. 249	28
Ex Parte 175, Increased Freight Rates, 1951, 280 I.C.C. 179; 281 I.C.C. 557; 284 I.C.C. 589	2
Ex Parte 196, Increased Freight Rates, 1956, 298 I.C.C. 279	3
Ex Parte 206, Increased Freight Rates, Eastern, Western and Southern Territories, 1956, 299 I.C.C. 429 and 300 I.C.C. 633	3

Page

Hawkins v. Western Pacific, 153 I.C.C. 301 26

King v. United States, 344 U.S. 254, 97 L. Ed. 301..18, 20

Maritime Asso. Boston Chamber of Commerce v. A. A. R.R. Co., 95 I.C.C. 539 26

Minnesota Intrastate Freight Rates, 300 I.C.C. 201.. 26

North Western-Hanna Fuel Co. v. United States, 161 F. Supp. 714 12

Ohio v. U.S., 292 U.S. 498, 78 L. Ed. 1388 27

Public Service Commission of Utah v. United States, 356 U.S. 421, 2 L. Ed. 2d 886, 78 S. Ct. 796 ..... 3, 4, 9, 14, 17, 22

Palmer v. Massachusetts, 308 U.S. 79, 84 L. Ed. 93 22

Robinson-Ransbottom Pottery Co. v. Pennsylvania R.R. Co., 188 I.C.C. 189 26

Utah Intrastate Freight Rates and Charges, 287 I.C.C. 315 29

Utah Intrastate Freight Rates and Charges, 297 I.C.C. 87 2

Utah Intrastate Freight Rates and Charges, 309 I.C.C. 149 ..... 3, 17, 19, 24

STATUTES CITED:

Interstate Commerce Act, Section 13 ..... 2, 3, 21

Transportation Act of 1958 ..... 7, 8, 21-23

28 U.S.C. 2284, 2325 2

Utah Code Annotated 1953, Section 54-4-2, 54-4-4 29

Utah Code Annotated 1953, Section 54-4-6 29

No. 712

In the Supreme Court of the United States

October Term, 1960

UTAH CITIZENS RATE ASSOCIATION AND STRUCTURAL STEEL AND FORGE COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY, UTAH RAILWAY COMPANY, TOOELE VALLEY RAILWAY COMPANY, SALT LAKE GARFIELD AND WESTERN RAILWAY COMPANY, THE OGDEN UNION RAILWAY AND DEPOT COMPANY, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees The Denver and Rio Grande Western Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, the Western Pacific Railroad Company, Utah Railway Company, Tooele Valley Railway Company, Salt Lake Garfield and Western Railway Company and the Ogden Union Railway and Depot Company move that the judgment of the district court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

The Interstate Commerce Commission will sometimes be referred to herein as I.C.C. and the Public Service Commission of Utah as P.S.C.U.

This is a direct appeal from a final judgment entered January 9, 1961, by a three-judge district court convened pursuant to 28 U.S.C. 2284, 2325, dismissing an action to set aside an order of the Interstate Commerce Commission. The order increased certain intrastate rail rates on freight moving within the State of Utah.

Pursuant to request of the intervening railroads the Commission instituted an investigation under Section 13 of the Interstate Commerce Act to determine whether freight rates and charges imposed and collected upon intrastate traffic within the State of Utah caused any unjust discrimination against or undue burden upon interstate or foreign commerce.

Interstate freight rates had been ordered increased nationwide by the I.C.C. in its proceeding designated Ex Parte 175, Increased Freight Rates, 1951, 280 I.C.C. 179; 281 I.C.C. 557; 284 I.C.C. 589. On application the P.S.C.U. refused to allow similar increases on intrastate traffic. An investigation under Section 13 of the Interstate Commerce Act was instituted by the I.C.C. under its Docket No. 31484, and after full administrative proceedings it issued its report on October 17, 1955 (297 I.C.C. 87), and under date of February 8, 1956, issued an order directing that intrastate freight rates in Utah be increased in amounts comparable to the increases ordered in interstate rates in Ex Parte 175. After three-judge federal district court action sustaining the Commission's order, this Court,

on appeal, under date of May 19, 1958, reversed the district court and directed that the Commission's order be set aside and that the cause be remanded to the I.C.C. for further proceedings in conformity with this Court's opinion (*Public Service Commission of Utah v. United States*, 356 U.S. 421, 2 L.Ed.2d 886, 78 S.Ct. 796).

In the meantime, in Ex Parte 196, Increased Freight Rates, 1956, 298, I.C.C. 279, and again in Ex Parte No. 206, Increased Freight Rates, Eastern, Western and Southern Territories, 1956, 299 I.C.C. 429 and 300 I.C.C. 633, the I.C.C. had authorized further nationwide increases in the interstate rates. The P.S.C.U. again refused to authorize corresponding increases on Utah intrastate traffic, and an additional proceeding under Section 13 of the Interstate Commerce Act was instituted under I.C.C. Docket No. 32253, on which full hearing was had February 12 and 13, 1958.

After remand of the original proceeding, in Docket 31484 on reversal by this Court, the I.C.C. reopened said cause "for further proceedings in conformity with the Supreme Court's opinion." The Docket 31484 and 32253 proceedings were consolidated and further hearings were had and voluminous additional and supplemental evidence was introduced. The I.C.C. on December 7, 1959, issued its report approving the increases sought in the combined proceedings. (309 I.C.C. 149) By such report the Utah Commission was granted thirty days within which to "permit the increases required" in Utah intrastate rates to remove the discrimination against and undue burden upon interstate commerce found by the I.C.C. to exist. On January 13, 1960, and within the thirty-day period specified, the P.S.C.U. notified the I.C.C. that it would make no

order in the case but would "accept as final such order as the Interstate Commerce Commission makes pursuant to its report and findings."

Appellant here, Utah Citizens Rate Association, on January 4, 1960, filed with the I.C.C. a petition for rehearing and reconsideration of the Commission's report. On March 17 1960, the I.C.C. issued its order herein assailed, denying the petition for rehearing and reconsideration filed by the appellant and requiring the railroads, appellees herein, to establish on May 13, 1960, the rates and charges for intrastate transportation within the State of Utah in accordance with the findings in its report.

Appellant, Utah Citizens Rate Association, thereupon instituted the instant suit seeking to have the later order of the I.C.C. as issued March 17, 1960, enjoined and set aside and upon filing of the complaint a three-judge district court was convened pursuant to the provisions of the statute above referred to.

The Public Service Commission of Utah, one of the parties to the proceedings involved in the prior appeal to this Court, did not join as a plaintiff in the instant suit and has taken no action of any kind attacking or questioning the report of the I.C.C. of December 7, 1959, nor the order of March 17, 1960, based thereon.

The three-judge district court, after lengthy and detailed consideration of the entire record and after referring to the former decision by this Court in *Public Service Commission of Utah et al. v. United States of America et al.*, 356 U.S. 421, 2 L.Ed.2d 886, held that

> "the general evidence tending to show that conditions affecting intrastate traffic were not more

> favorable than those pertaining to interstate traffic, —density of traffic studies are now more convincing in favor of the carrier's position. Additional specific data and new comparative ratios have been presented by them which include terminal costs in the evaluated factors. And the record heretofore held to be deficient has been otherwise strengthened. * * *."

The district court concluded that "the Commission's present order is not vulnerable to the focused attack nor to the other objections now urged by plaintiffs" and by unanimous opinion sustained the Commission's order and dismissed appellants' complaint.

QUESTION PRESENTED FOR REVIEW

Appellants' principal contention on this appeal as set forth in their Jurisdicitional Statement is that there is inadequate evidentiary support for the finding as made by the I.C.C. that conditions incident to intrastate transportation of freight in Utah are not more favorable than those incident to interstate transportation between Utah and adjoining states. Appellees insist that such evidentiary support is now overwhelming.

SUMMARY OF ARGUMENT

Comparative Operating Conditions and Costs

In the consolidated hearing—reopened by the I.C.C. after reversal of the prior case by this Court—the appellee railroads introduced voluminous and supplemental evidence, a substantial portion of which was secured from a train study made by the Utah railroads of actual operating conditions under which both intrastate and interstate traffic moved within the State of Utah. From the train study

evidence was produced to supplement and clarify evidence which had been introduced at the prior hearing. Substantial additional evidence was supplied in the areas where this Court had considered the evidence deficient on the prior hearing. Such evidence was more than ample to supply, and remove any question concerning, those deficiencies.

This new evidence showed that the majority of traffic handled in local trains was intrastate traffic while the great majority of traffic on through trains was interstate traffic. Local trains as handled by one crew were smaller or shorter trains, traveling at much slower speeds than through trains. Wages were higher on local trains, with much more overtime paid. Operating conditions on local or branch lines where more intrastate traffic moved were otherwise more onerous with steeper grades and much more excessive curvatures. The evidence was overwhelming to show that the cost of handling intrastate traffic was considerably higher than the cost of handling interstate traffic.

Traffic Density

At the prior hearing as well as the later hearing appellants introduced evidence purporting to show intrastate statistics and intrastate density which admittedly lumped together all Utah traffic, including intrastate as well as all Utah interstate traffic. At the reopened hearing appellees introduced actual ton-mile figures properly segregated between intrastate and interstate traffic, which showed interstate traffic density to be substantially greater than intrastate traffic density. Evidence with respect to unit or net ton-mile revenue showed that the net ton-

mile revenue for interstate traffic was uniformly higher than that for intrastate traffic. Interstate density was proved to be from two to six times as great as intrastate density, correcting the erroneous impression produced by appellants at the prior hearing.

Operating Ratios

In addition to voluminous additional evidence introduced as a result of the train study, the railroads also made a separate and full presentation of revenues, costs and ratios under the so-called "North Carolina Formula." These figures were admittedly based on arbitrary allocations as required by reports under a prescribed P.S.C.U. formula but, as stated by the I.C.C., nevertheless gave "rough approximations", which the I.C.C. considered with the train study and other cost evidence submitted. The additional evidence showed that operating ratios on intrastate traffic were considerably higher than those on interstate traffic.

Terminal Costs

While an actual and precise separation between interstate and intrastate costs cannot be made and should not be required under the 1958 Transportation Act, nevertheless under the arbitrary allocation figures required to be filed under the formula specified by the P.S.C.U. the railroads presented as accurate a separation as is possible in connection with the "North Carolina Formula," using the arbitrary allocations required by the P.S.C.U. together with such actual figures as were otherwise available, which figures included terminal costs and showed all costs, including terminal costs, of the handling of intrastate traffic to be substantially higher than the costs for handling interstate traffic.

Passenger Deficit

No evidence was shown as to whether the passenger deficit in Utah was higher or lower than elsewhere and it was not claimed nor in any way suggested by protestants-appellants that the passenger deficit would in any way change the results, and under the Transportation Act of 1958 the appellee railroads, the I.C.C. and the three-judge district court considered it unnecessary to make a separate showing with respect to passenger service.

Comparative Rates

It has been uniformly held that ton-mile or car-mile earnings on short hauls cannot be compared with similar earnings on long hauls. It is recognized that earnings per mile on short hauls ordinarily are and should be higher than for long hauls. Where movements of commodities intrastate could be compared with similar commodities moving interstate over comparable mileage, interstate rates were substantially higher and the unit or net ton-mile revenue produced by interstate traffic was shown to be uniformily higher than for intrastate traffic.

ARGUMENT

The judgment of the district court should be affirmed because the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

COMPARATIVVE OPERATING CONDITIONS AND COSTS

At the beginning of his "ARGUMENT" in his Jurisdictional Statement, counsel for appellants poses the question:

> "A. Does the record on further hearing before the Interstate Commerce Commission supply the deficiencies in evidence found by this Court to exist in the railroads' proof in *Public Service Commission of Utah v. United States*, 356 U.S. 421, 2 L. Ed. 2d 886?"

At page 427 of 356 U.S. this Court stated:

> "As to the finding that intrastate conditions were *not* more favorable than those incident to interstate transportation the railroad evidence on this point was far from substantial. In essence, it merely showed that intrastate and interstate traffic was handled by the same crews and intermingled in the same movement. * * *."

At the reopened hearing after remand to the I.C.C. by this court the defendant railroads introduced a voluminous amount of additional evidence including a train study conducted separately by each of the railroads in Utah covering actual operations and actual movements of traffic within Utah, both interstate and intrastate. This study was conducted by the railroads in an effort to determine the nature of traffic actually moving and the cost of actually handling the Utah intrastate traffic and the interstate traffic within Utah. This evidence was in addition to the testimony showing that the Utah intrastate traffic was handled in the same trains, by the same train crews, over the same tracks and in all other respects identical with interstate traffic within Utah.

Operating conditions were shown to be considerably more onerous with respect to the handling of intrastate traffic than with interstate traffic. (R[3] 48-50, 66-70)* The study showed that intrastate traffic moves predominantly in local or way trains while interstate traffic was handled predominantly in through trains. During the period of study 88 per cent of all loaded freight car miles operated in Utah were in interstate traffic while only 12 per cent were in intrastate traffic. (R[3] 18 CR) Approximately 99 per cent of all interstate traffic was handled in through trains while only 1 per cent of interstate traffic was handled in local or way trains. The majority of traffic handled by local or way trains was intrastate traffic, and this was true in spite of the fact that a considerable number of iron ore trains handling a large percentage of intrastate traffic are classified as through trains although their crews receive higher local way train wages. (R[3] 48 CR)

In local or way trains, where the majority of traffic handled was intrastate traffic, speeds were considerably slower, and a smaller number of cars per crew were handled. The average consist of local trains was only nine loaded cars per train whereas on through trains the consist contained an average of forty loaded cars per train. (R[3] 183, 184 CR)

Arbitraries (additional compensation) were paid to local or way train crews, which were not paid to through

---

*Reference marks [1], [2], and [3] herein appearing preceding record references and exhibit numbers indicate the respective records of the three separate hearings in the proceedings as follows:

[1]Indicates reference to the Docket 31484 proceeding.

[2]Indicates reference to the Docket 32253 proceeding.

[3]Indicates reference to the reopened consolidated hearing including both Dockets 31484 and 32253.

train crews, and there was much more overtime paid to local or way train crews than to through train crews. (R. 20 CR)

Operating conditions on branch lines, which handled a majority of intrastate traffic, were more onerous because grades were steeper, curvatures were more excessive, and in some areas continued braking requirements with loads on branch line grades all added to the handling and maintenance costs. (R. 25-50)

Wage costs on local or way trains were considerably higher, and the wage item is shown to be very important, amounting on the Union Pacific to over 50 per cent of train operating costs (R. 20 CR) and on the Denver and Rio Grande to over 60 per cent of train operating costs (R. 51 CR). On Union Pacific the average wage cost on through freight trains was $23.52 per thousand loaded car miles while the average wage cost on local freight trains was $226.07 per thousand loaded car miles. (Exhibit 1 CR) (R. 21 CR). Separating this between interstate and intrastate traffic handled and including the intrastate traffic handled on through trains, the results show that the average wage cost for handling all interstate traffic as handled in both through and local trains was $26.68 per thousand loaded car miles while the average wage cost of handling all intrastate traffic as handled in both through and local trains in Utah was $38.50 per thousand loaded car miles. (R. 21, 22 CR). Similar results were shown by study made by the Denver and Rio Grande Western and other railroads. (See Exhibit 2 CR, 3 CR and 4 CR). With the Rio Grande the average wage cost on all interstate traffic on both through and local trains was $21.06 per thousand loaded car miles while the average wage cost

on all intrastate traffic on both through and local trains within the State of Utah was $71.22 per thousand loaded car miles. This proves that the wage cost per thousand car miles for intrastate traffic on the Rio Grande is over three times the cost of its handling interstate traffic within Utah. (R. 54 CR). On the basis of ton-miles rather than loaded car miles the wage cost of handling Utah intrastate traffic is two times greater than the cost of handling Utah interstate traffic. (R. 215 CR).

The conclusion of the three-judge district court in the case of *North Western-Hanna Fuel Co. v. United States*, 161 F. Supp., 714 (which case was affirmed per curiam by this Court on the same date that the decision on the earlier Utah case was handed down), (356 U.S., 581), is appropos here, where at page 719 the Court stated:

> "* * * The number of trainmen required on local trains, the wages paid, the many train stops which necessarily are required in local transportation, together with other factors reflected in the record, amply established that the unit cost of rail transportation on intrastate traffic was at least equal to, and in many instances greater than, the railroads' interstate cost of comparable transportation. * * *."

Counsel for appellant refers to the statement of Commissioner Freas in his dissenting opinion with respect to lack of evidence respecting "costs for similar traffic units." A substantial amount of evidence with respect to cost per unit of traffic was contained in the record but was overlooked by Commissioner Freas and has been ignored by counsel for appellant.

The record shows that in 1957 the average revenue per ton-mile of all railroads in the United States was 1.44 cents; in the Western District it was 1.42 cents; in the Mountain Pacific States (including Utah) 1.43 cents; but for the Class I Roads operating in the State of Utah the revenue was only 1.33 cents per ton-mile. In other words, as a result of the failure of the P.S.C.U. to grant the Ex Parte Nos. 175, 196 and 206 rate increases on Utah intrastate traffic the earnings per ton-mile on all traffic, interstate and intrastate, of the Utah roads is well below that in the Mountain Pacific States (including Utah) (Exhibit 15 CR, R. 355). Calculations of the ton-mile revenue of the Union Pacific made from data on pages 8 and 12 of Exhibit 1 CR show that for the year 1957 the average revenue on Utah interstate traffic was 1.40 cents per ton-mile while on Utah intrastate traffic the average revenue was but 1.05 cents per ton-mile.

Exhibit 52 CR shows that by application of the separation principles used in the North Carolina formula, (which formula will be referred to later herein under the heading "Operating Ratios"), on the Rio Grande, Union Pacific and Western Pacific for the year 1956, Utah intrastate traffic produced an average per ton-mile revenue of 1.23 cents, and the average per ton-mile cost of handling such traffic was 1.16 cents, leaving a net of 0.07 cent revenue over expenses per ton-mile. For the same year the exhibit shows Utah interstate traffic produced an average per ton-mile revenue of 1.25 cents, with an average per ton-mile cost of 0.63 cent, leaving a net revenue over cost of 0.62 cent per ton-mile for interstate traffic. In 1957 Utah intrastate traffic produced an average of 0.14 cent per ton-mile of revenue over cost while interstate traffic handled within Utah produced an average of 0.66 cent per

ton-mile of revenue over cost. During 1957 the Ex Parte 175 increases were in effect in Utah on intrastate traffic, while the prior case before its reversal was pending before this Court, and as a result showed a higher net revenue over cost for intrastate traffic but still well below the net revenue produced by interstate traffic.

From this showing it cannot be denied that the cost per unit of traffic of handling Utah intrastate traffic greatly exceeds the cost of handling interstate traffic within Utah and that the revenue per traffic unit derived from interstate traffic handled within Utah greatly exceeds the revenue per traffic unit from Utah intrastate traffic. Appellants made no showing of conditions existing which would warrant any conclusion that the result should be otherwise.

TRAFFIC DENSITY

In the prior case involving the Utah rates the Court stated: (356 U.S. at 426)

> "* * * The annual reports of the four interstate railroads operating in Utah showed that their Utah operating ratios (freight service cost divided by freight service revenue) and the Utah density statistics (ton miles of traffic per mile of main track) were more favorable than comparable systemwide figures. * * *."

Again at page 428 the Court stated:

> "* * * As we have previously noted, appellants offered convincing evidence not only of greater density on intrastate operations, permitting a wider spread of fixed costs but also of lower operating ratios and higher returns as the percentage of intrastate traffic increased. * * *"

The I.C.C. in its prior report disregarded this evidence of appellants because it did not have a proper factual basis and thus did not present a true picture. The statistics as produced by appellants were taken from reports submitted by the railroads to the P.S.C.U. under a formula prescribed by the P.S.C.U. The figures were segregated between "system" and "Utah" statistics according to the required formula but there was no segregation between interstate and intrastate traffic within Utah (where 88% of the total traffic is interstate traffic) and the separation between "Utah" and "System" traffic was on an arbitrary train mile apportionment basis. The P.S.C.U. even with its required formula has never prescribed a method for separating or segregating intrastate operating expenses and revenues from interstate operating expenses and revenues on traffic moving within Utah.

At the prior hearing these misleading statistics were introduced by appellants near the close of the hearing and the respondent railroads did not have available a proper breakdown of the actual figures to enable them to present proper opposing evidence. After that hearing a traffic study was made by the railroads and when the matter was reopened and rehearing had before the I.C.C., the respondent railroads introduced actual traffic density statistics for the State of Utah, properly segregated between intrastate and interstate traffic, and, following a recognized formula, introduced further testimony with respect to operating ratios as hereafter referred to.

It is admitted by counsel for the appellant in his Jurisdictional Statement, pages 16-17, that in the present case the evidence as to density produced by appellants was "the same as in the preceding case." It was admitted by appellants' witness who prepared the exhibit and produced the

statistics therein contained that the figures used for Utah *intrastate* traffic did not represent Utah intrastate density alone, but the figures shown and which appellants claim as *intrastate* figures also included all interstate traffic originating in Utah and moving out of Utah, all interstate traffic originating out of but terminating in Utah, and all interstate "bridge" traffic which neither originates or terminates in but moves through or across Utah. (R[1] 312 CR; 316-317 CR; 323 CR; 326-328 CR.) All such interstate traffic has been subject to all of the Ex Parte increases in freight rates from their first inception. Thus the total of Utah interstate and intrastate traffic was lumped together and considered as Utah intrastate traffic for appellants density figures whereas the railroad train study showed 88 percent of this total Utah traffic to be actually interstate traffic. Appellants then compared this total Utah traffic with the total entire system traffic of appellees and used the *entire* system traffic (which would include intrastate traffic in other states (R[2]327 CR)) as a basis for the figures which they claimed showed interstate traffic density.

At the further reopened hearing before the I.C.C. exhibits were introduced by the railroads showing the exact traffic density of Utah intrastate traffic and of interstate traffic handled within Utah. Exhibit[3] 1 CR, page 8, shows that the average density of interstate traffic handled within Utah by the Union Pacific for the years 1953 through 1957 is more than three times greater than that of the Utah Intrastate traffic. (R[3] 24-25 CR) Exhibit[3] 2 CR, page 16, shows that for the Rio Grande the traffic density of the interstate traffic handled within Utah is more than six times the density of Utah intrastate traffic. Similar showings were made by Western Pacific Railroad Company in Exhibit[3] 3 CR.

Exhibit 53 CR was introduced for the purpose of demonstrating that the density of traffic "in the region taken for the purpose of setting the interstate rates," — in this case the entire systems of the Utah railroads, — exceeds the average traffic density of the Utah intrastate traffic by about four to one. Such a showing is described by Justice Frankfurter in *Public Service Commission of Utah v. United States*, 356 U.S. 421, 453, as being "the most persuasive" comparison. It is thus proven by the present record that the figures used by appellants as representing Utah intrastate traffic density include figures for the interstate traffic handled within Utah. In other words, appellants seek to take credit, in showing Utah intrastate traffic density, for all of the interstate traffic handled within Utah. The I.C.C. in its last report (309 I.C.C. 149), upon which the order here under attack is based, again recognized this fact, and on pages 13 and 14 of its report (309 I.C.C. 156-158) refers to the very figures introduced by protestants (appellants) in the prior hearing (which are the same as used in this proceeding) and states: "The density figures submitted by the protestants showing the intrastate density to be much greater than the system densities are impaired by the fact that those data include the Utah interstate traffic, which, in turn, includes the heavy overhead movement;" and after referring to the correct, actual density figures concludes: "The foregoing data established the more favorable density of the interstate traffic compared with the intrastate traffic."

There can now be no question but that the record proves that the traffic density statistics are not more favorable to Utah intrastate traffic whether they be compared with the density of system-wide traffic or with Utah interstate traffic.

OPERATING RATIOS

This Court in the prior Utah case referred to operating ratios. The defendant railroads have at all times insisted that it is impossible to produce accurate operating ratios unless some method be devised for a precise separation between intrastate and interstate expenses and revenues. Their position has been confirmed in this matter not only by the pronouncement in the case of *King v. United States*, 344 U.S. 254, 97 L. Ed. 301, and other similar cases but also by the enactment of the Transportation Act of 1958, which renders such a separation unnecessary.

In a further attempt to produce evidence with respect to operating ratios, the railroads produced evidence based upon the so-called "North Carolina Formula." In doing so, the railroads used such actual figures as were available and made separations of other figures between interstate and intrastate in accordance with that formula. For still other figures they used the statistics as reported to the Utah Commission according to the formula prescribed by that Commission, which is admittedly an arbitrary formula and which the I.C.C. discounted to some extent because it said it was "dependent upon train-mile apportionments." Nevertheless, that was the best evidence available, and in that connection we must point out that the operating ratios as produced and introduced in evidence by the appellants were based entirely upon those condemned figures taken from the reports made to the P.S.C.U. (R[3] 316-317 CR). Under the North Carolina formula the operating ratios as produced showed that in each instance the Utah intrastate operating ratio exceeds either the Utah interstate ratio or the system ratio, thereby indicating the higher operating cost of handling Utah intrastate traffic than either

the Utah interstate traffic or the system traffic of the Utah roads. (See Exhibit 3 CR, pages 2 and 3; Exhibit 54 CR). Counsel for appellant refers to the evidence introduced under this North Carolina Formula as an "abortive effort" and states that it "was rejected by the Commission as being unreliable." With respect to this the I.C.C., at page 24 of its report hereunder attack states "that the evidence of neither side is entitled to controlling weight." However, the Commission did not disregard it completely but referred to the use of the same formula found in *Chicago Intrastate Suburban Fares of Milwaukee Railroad*, 305 ICC 73, and quoted its holding therein that the apportionments were made by the respondents' Chief Statistician, who had had 36 years' experience in the railroad accounting field, and while the apportionments "rest in part upon uncertain bases," nevertheless stated that "they may be accepted as rough approximations only." (P. 25 of ICC report). It is apparent that the Commission, rather than disregarding this evidence completely, did give favorable consideration to it, concluding (309 I.C.C. at 165):

> "A consideration of *all the evidence of record* warrants the conclusion that the circumstances and conditions attending the performance of transportation service intrastate in Utah are not more favorable than those attending the transportation of interstate traffic to, from, or through Utah. * * *" (Emphasis supplied)

TERMINAL COSTS

In connection with his argument concerning terminal costs counsel again refers to the evidence under the North Carolina Formula as being "abortive" and "unreliable." Because it is based upon the same figures taken from the same source (Utah Reports) as appellants' statistics, and because

of the fact that the Commission did give some consideration to it, we insist that the Commission was entitled in the absence of other evidence to so give consideration to it and the figures included in that North Carolina Formula included completely all terminal costs as well as all other costs. With respect to this matter the District Court in its decision here under attack, after a thorough study of the evidence, stated:

> "* * * Additional specific data and new comparative ratios have been presented by them (the railroads) which include terminal costs in the evaluated factors. And the record heretofore held to be deficient has been otherwise strengthened.***"

The Court further stated that "interstate terminal costs could not possibly be higher than intrastate terminal costs within Utah; that the latter traffic must of necessity have two terminal costs (origin and destination) assigned to it; that interstate traffic would have only one if it originated or terminated in Utah; and bridge traffic moving across Utah would have none at all, or, at most, one (where switched between railroads within the state)." This conclusion is so obviously correct that further comment appears unnecessary.

PASSENGER DEFICIT

Counsel for appellant has argued that it was incumbent upon the Commission to consider the passenger deficit in connection with their evaluation of the evidence in this case. The case of *Kiny v. United States*, 344 U.S. 254, 97 L. Ed. 301, held that the Commission *may* give weight to deficits in intrastate passenger revenue when prescribing intrastate freight rates. It will be noted that in that case the Court does not hold that the Commission *must* give weight

to such passenger deficits. Counsel then refers to the prior decision in the Utah case and to the case of *Chicago M. St. P. & P.R.R. Co. v. Illinois*, 355 U.S. 300, 2 L. Ed. 2d 292.

We think no one would question but what there was ample justification in the *Milwaukee* case for requiring consideration of conditions under which passenger traffic moves on a statewide basis and that, as held by the Court, where only a small segment concerning passenger service only was involved such as the Chicago suburban area, passenger conditions elsewhere in the state should be considered because passenger equipment and services undoubtedly are and must be affected by statewide use and service. However, suppose the passenger deficit in Utah was higher than the passenger deficit elsewhere, would that be any reason — other things being equal — why interstate freight traffic should bear a greater burden to compensate for that passenger deficit than intrastate freight traffic should? Or, if the passenger deficit in Utah were less than in other areas, would that be any reason— other factors being equal —why intrastate freight traffic should be preferred and interstate freight traffic be required to produce additional revenues otherwise needed by the railroads? It would seem that these questions would compel an obvious answer, and, at least where the passenger traffic is an entirely separate type and segment of traffic, the Congress must have had this in mind when they passed the 1958 Amendment to the Transportation Act, stating that the Commission could make their investigations and conclusions with respect to freight rates "* * * without a separation of interstate and intrastate property, revenues and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any state. * * *" This position seems to be confirmed by

what is stated from the Congressional Conference Report referred to in the decision of the district court as reproduced beginning on page 33 of appellant's Jurisdictional Statement.

The 1958 Transportation Act was the culmination and result of weeks of the best thinking of some of the best minds in the United States Congress. Surely, after all the time and effort expended, the Congress did not come up with a useless thing that accomplished nothing whatsoever. Rather it must be considered that the wording in the Amendment means what it says, without the necessity of going afield to find some other meaning or some basis for saying that such attempt by Congress to meet a problem they thought was serious was purely abortive.

The statement of Justice Frankfurter in *Palmer v. Massachusetts*, 308 U.S. 79, 84 L. Ed. 93, at page 83 of 308 U.S., is appropos here, where, referring to interpretation of a statute, he says:

> "* * * And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.***"

Counsel in his Jurisdictional Statement refers to and quotes from the decision of the district court and to the dissenting opinion of Justice Frankfurter in the former Utah case. We would like to call attention to the following conclusion which Justice Frankfurter made in that case. (356 U.S. at 459):

> "It does not necessarily follow that the Commission should be required to make findings, supported by evidence in the record, that the intrastate passenger deficit is not lower than the interstate, or about the profitableness of, or circumstances surrounding, any segment of intrastate operations with which it is not immediately concerned. Indeed, the consequences that follow in the train of such a requirement demonstrate that it exalts formal consistency over sound policy. In the first place if the Commission must determine the profitableness of intrastate passenger operations, it will of course be compelled to segregate revenues and costs attributable to intrastate and interstate traffic. Yet it is precisely this that in *Illinois Commerce Commission v. United States*, 292 U.S. 474, and the *King* case we said, urged on by the difficulty of accurate allocation, was not required when interstate and intrastate traffic were mingled together."

We think the conclusion is amply warranted, as voiced by the district court that the Amendment obviates "the previously determined necessity of affirmative findings or evidence showing that the intrastate passenger deficit is not lower than the interstate, or concerning the profitableness of, or circumstances surrounding, segments of intrastate operations with which the Commission was not immediately concerned. The legislative history of the amendment bolsters this view."

If it is appellants contention that the deficit from Utah intrastate passenger operations is any less proportionate than the deficit from Utah interstate passenger operations, testimony to prove such a contention should have been introduced before the I.C.C. by appellants. This they did not do. There is nothing in the record to indicate any basis for such a contention.

COMPARATIVE RATES

Under his argument on comparative rates counsel for appellant again refers to the dissent of Commissioner Freas with respect to unit revenue from similar traffic units. We have already referred supra to the fact that unit ton-mile revenue generally in Utah is lower than in either the Mountain Pacific states as a whole, the western region, or the United States, and we have referred to calculations which may be made from Exhibit 1 CR, showing that on Union Pacific the ton-mile revenue in Utah on interstate traffic was 1.40 cents per mile while ton-mile revenue on intrastate traffic was only 1.05 cents per mile.

Counsel refers to Exhibit 7 CR through 20 CR and argues that if the examples therein contained are reduced to a revenue per mile basis, then in the great majority of cases the car-mile earnings on intrastate rates are substantially higher than the car-mile earnings on interstate rates. Counsel has pointed to not one single example from any of such exhibits, and the exhibits show exactly the contrary. There were one or two specific instances where an intrastate rate was as high as the comparable interstate rate and the I.C.C. specifically exempted those from the increases on page 28 of its report of December 7, 1959, (309 I.C.C. at 166), and further specifically provided that increases in intrastate rates are not to be permitted when the increased intrastate rates would exceed comparable interstate rates. A study of the exhibits referred to (Exhibits 7 CR through 20 CR) and specific reference to a few representative comparisons disputes counsel's contention completely.

Where an interstate rate covers a haul comparable to the haul covered by a Utah intrastate rate, the interstate

rate will be found to be considerably higher. For example, Exhibit 7 CR, page 1, line 14, shows an intrastate movement of sugar beets from Silver, Utah, to West Jordan, Utah. The mileage involved is 164 miles and the rate 172. Page 3, line 7, of the same exhibit shows an interstate movement of the same commodity from Moreland, Idaho, to Garland, Utah, 163 miles, with a rate of 240. Other examples are as follows:

Page	*Line*		*Miles*	*Present Rate*
2	3	Mendon, Utah, to Lewiston, Utah	32	82
3	1	Malad, Idaho, to Garland, Utah	32	97
2	7	Hot Springs, Utah, to Lewiston Utah	80	131
3	2	Dayton, Idaho to Garland, Utah	70	144
2	9	Delta, Utah, to West Jordan, Utah	142	187
3	4	Tyhee, Idaho, to West Jordan, Utah	139	221
Exhibit 8 CR—Fat Cattle				
1	11	Delta, Utah, to Ogden, Utah	171	$ 94.68
2	6	Opal, Wyoming, to Ogden, Utah	156	116.39
1	9	Nephi, Utah, to Ogden, Utah	126	77.47
2	5	Carter, Wyoming, to Ogden, Utah	118	113.28
Exhibit 9 CR—Feeder Cattle				
1	9	Ogden, Utah, to Delta, Utah	171	61.85
3	7	Opal, Wyoming to Ogden, Utah	170	133.90
1	3	Wahsatch, Utah, to Brigham City, Utah	86	47.69
3	1	Swan Lake, Idaho, to Ogden, Utah	85	81.36
Exhibit 10 CR—Fat Sheep				
1	7	Ephraim, Utah, to Ogden, Utah	154	76.66
1	8	Gunnison, Utah, to Ogden, Utah	174	77.46
2	1	Pebble, Idaho, to Ogden, Utah	132	93.09
Exhibit 20 CR—Beet Pulp				
1	15	West Jordan, Utah, to Kema, Utah	157	16
1	16	West Jordan, Utah, to Gramse, Utah	158	16
1	17	West Jordan, Utah, to Richfield, Utah	160	16
3	1	Lincoln, Idaho, to Madsen, Utah	159	26

It is true that if a comparison on a ton-mile or car-mile basis is made between a rate covering a short haul and one covering a long haul, the long haul will probably show a lower ton-mile or car-mile revenue. It is improper, however, to compare either car-mile or ton-mile revenue produced on a short haul with that produced by a long haul.

> "* * * It is an axiom of rate making that longer hauls yield lower ton-mile revenues." * * *" *Minnesota State Freight Rates*, 300 I.C.C. 201 at 216.

In that case the Commission stated at page 219:

> "The protestant Sugar Company contends that the intrastate rates are presently yielding higher earnings than are the interstate rates to the same points. This contention is not supported by the evidence. It is based upon a comparison of ton-mile earnings derived from short hauls within Minnesota with earnings from longer hauls from interstate origins. * * *."

At page 217:

> "Comparisons of the rates paid by shippers in interstate movements with those for comparable distances under the intrastate scales show a consistent advantage in favor of the intrastate shippers. * * *."

See also *California Intrastate Freight Rates and Charges*, 302 I.C.C. 189; *Robinson-Ransbottom Pottery Co. v. Pennsylvania R.R. Co.*, 188 I.C.C. 189; *Hawkins v. Western Pacific*, 153 I.C.C. 301; *Maritime Asso. Boston Chamber of Commerce v. A.A.R.R. Co.*, 95 I.C.C. 539.

Class and Commodity Rates to Florida, 142 I.C.C. 151 at 155:

> "* * *. It is recognized that earnings per mile for short hauls ordinarily are and should be higher than for longer hauls. * * *."

This Court has pronounced the same rule, which has been uniformly followed for many years. *Ohio v. U.S.*, 292 U.S. 498, 78 L. Ed. 1388. In that case intrastate rates on coal in Ohio were reduced by order of the Public Utilities Commission of Ohio. This resulted in a disruption of the relationship of the intrastate rates to the interstate rates from Pittsburgh and other similar points. After 13th Section hearings before the I.C.C. that body entered orders providing increases in certain intrastate freight rates to their former level. The district court refused to set aside the I.C.C. order and the matter was appealed to this Court. It was argued that existing interstate rates from portions of Kentucky and West Virginia and from Tennessee were lower per ton mile than those applicable to intrastate traffic in Ohio. In answer thereto this Court stated at p. 508:

> "* * * The fact is that the rates from the southern inner and from the outer crescent territory are much higher than those from Ohio mines. * * * It is undoubtedly true that the former show lower earnings per ton mile than the latter. This, however, is in entire accord with the theory of rate making, namely, that the longer haul may be expected to yield a lower ton-mile return. * * *."

The figures concerning revenue and cost per ton-mile as repeated by counsel on page 19 of his Jurisdictional Statement are taken from the arbitrary train-mile apportionments as included in the reports to the Utah Commission under that commission's allocation formula. As admitted by appellants' witness, these figures, while purporting to cover only Utah intrastate traffic, actually include

interstate traffic as well (R. 312 CR, 316-317 CR) and the costs that are used in such figures (which likewise include both intrastate and interstate traffic within Utah) are apportioned upon an arbitrary formula, which counsel is quick to characterize as "unreliable" in all of his other arguments.

Finally counsel for appellants argues, page 5, that there is nothing to show that the interstate and intrastate rates were in proper relationship before the proposed increases were ordered by the I.C.C. and poses this as one of the questions involved in this appeal. The Public Service Commission of Utah and the Interstate Commerce Commission have had the matter of Utah intrastate rates before each of them repeatedly for many years. With respect to the general level of rates and plaintiff's argument as to "proper relationship," the I.C.C. found in *Emergency Freight Rates* 1935, 213 I.C.C. 249 at 250, that "prior to April 18, 1935, the intrastate rates within Utah generally were upon the same level as the interstate rates applying to and from that state. * * *." The only thing that has happened in the meantime to alter the relationship between the general level of the interstate and intrastate rates since such finding by the I.C.C. in that case has been the refusal, in whole or in part, of the P.S.C.U. to permit increases in its intrastate rates following nation wide general increases ordered by the I.C.C. in interstate rates. In this connection the attention of the Court is called to the decision of the I.C.C. in a proceeding involving the Utah intrastate rates in connection with Ex Parte 162, 166 and 168 increases. The Utah Commission had allowed only part of the comparable increases ordered interstate by the I.C.C. in Ex Parte 162 and 166, and in Ex Parte 168 it had denied all increases in intrastate rates. In a 13th Section case involving those increases,

Utah Freight Rates and Charges, 287 I.C.C. 315, the I.C.C., after ordering the increases on intrastate traffic, added a paragraph somewhat different from its usual saving clause, wherein it stated at 345:

> "The foregoing findings and conclusions are without prejudice to the right of the authorities of the State of Utah, or of any other interested party, to apply for modification thereof as to any specific intrastate rate or charge affected thereby, *on the ground that such rate or charge is not related to the interstate rates and charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.*" (Emphasis Supplied.)

Further, there is a provision in the Utah law that not only allows but in fact requires the Public Service Commission of Utah to make an investigation on its own motion if at any time it concludes (or if complaint is made to it) that any rate or fare is out of line or excessive or unreasonable (Utah Code Annotated 1953, Section 54-4-2, 54-4-4). The P.S.C.U. further has not only the power but the duty to investigate rates set or proposed by the I.C.C., and if any such rate is in its opinion excessive or discriminatory, such law provides that it "shall apply by petition or otherwise to the Interstate Commerce Commission or to any court of competent jurisdiction for relief." Utah Code Annotated 1953, Section 54-4-6.

The Utah Commission has never instituted any investigation or applied to the I.C.C. under those statutes seeking any relief claimed to have been made necessary because of any intrastate rates which have been prescribed by the I.C.C., nor has any complaint been made to it that there was any lack of proper relationship between any intrastate and interstate rate on any commodity.

Further, the Utah Commission has not joined in this suit attacking the last order of the I.C.C. increasing Utah intrastate rates, but on the contrary, has indicated its acceptance of such order as the I.C.C. might make pursuant to its report and findings. Thus there can be no question but what the interstate and intrastate rates are and have been in proper relationship except as that relationship has been affected by the failure of the Utah Commission to grant increases comparable to those imposed upon interstate commerce.

CONCLUSION

For the foregoing reasons we submit that the decision below is correct, that the district court properly concluded "that the Commission's present order is not vulnerable to this focused attack, nor to the other objections now urged by plaintiffs" and that the questions now before this Court on which the decision of the cause depends are so unsubstantial as not to warrant further argument. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

A. U. Miner
Counsel of Record for Railroad Appellees
404 Union Pacific Bldg.
Salt Lake City, Utah

L. W. Hobbs
Bryan P. Leverich
Ernest P. Porter
Albert R. Bowen
S. N. Cornwall
Attorneys for Railroad Appellees.

PROOF OF SERVICE

I, A. C. MINER, counsel of record for railroad appellees herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of March 1961, I served on behalf of all railroad appellees herein copies of the foregoing Motion on the several parties thereto as follows:

(1) On the United States by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah, at Room 200, Federal Building, Salt Lake City, Utah, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D. C., and to Robert A. Bicks, Acting Assistant Attorney General, Department of Justice, Washington, D. C.

(2) On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to Robert W. Ginnane, Esq., General Counsel, and to Charlie H. Johns, Assistant General Counsel, at the office of the Commission, Washington, D. C.

(3) On the plaintiffs and appellants by mailing a copy thereof in a duly addressed envelope with first-class postage prepaid.

To:

Calvin L. Rampton, Esq.
721 Continental Bank Building
Salt Lake City, Utah
Counsel of Record for Appellants.

A. C. Miner

ILE COPY

Office-Supreme Court, U.S.
FILED
MAR 8 1961
JAMES R. BROWNING, Clerk

No. 712

In the Supreme Court of the United States

OCTOBER TERM, 1960

UTAH CITIZENS RATE ASSOCIATION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION TO AFFIRM

ARCHIBALD COX,
Solicitor General,
W. WALLACE KIRKPATRICK,
Acting Assistant Attorney General,
CHARLES H. WESTON,
JOEL E. HOFFMAN,
Attorneys,
Department of Justice, Washington 25, D.C.

ROBERT W. GINNANE,
General Counsel,
CHARLIE H. JOHNS, JR.,
Associate General Counsel,
Interstate Commerce Commission, Washington 25, D.C.

INDEX

	Page
Statement	1
Argument	5
Conclusion	11

CITATIONS

Cases:

Chicago, M., St. P. & P. R. v. *Illinois*, 355 U.S. 300	3, 9
Des Moines & Central Iowa R. v. *Chicago, B. & Q. R. Co.*, 232 I.C.C. 489	6
Ex parte No. 175, 280 I.C.C. 179, 281 I.C.C. 557, 284 I.C.C. 589	2
Ex parte No. 196, 298 I.C.C. 279	2, 3, 7
Ex parte No. 206, 299 I.C.C. 429, 300 I.C.C. 633	2, 3, 7
Georgia Public Service Commission v. *United States*, 283 U.S. 765	10
King v. *United States*, 344 U.S. 254	7, 8
New Automobiles in Interstate Commerce, 259 I.C.C. 475	6
Public Service Commission v. *United States*, 356 U.S. 421	2, 6, 9
Public Service Commission v. *United States*, 146 F. Supp. 803	4
Sprunt, Alexander, & Son v. *United States*, 281 U.S. 249	10
Utah Intrastate Freight Rates and Charges, 297 I.C.C. 87	6
Wisconsin R.R. Commission v. *Chicago, B. & Q. R.R.*, 257 U.S. 563	10

586430—61

Statute:

	Page
Interstate Commerce Act, Sec. 13(4), as amended, 72 Stat. 570, 49 U.S.C. 13(4)	1, 2, 5, 8, 9

Miscellaneous:

104 Cong. Rec. 15527	8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 712

UTAH CITIZENS RATE ASSOCIATION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court which dismissed an action brought by a rate association of shippers and one of its members to set aside an order of the Interstate Commerce Commission. The complaint attacked the Commission's determination, made pursuant to Section 13(4) of the Interstate Commerce Act, as amended, 72 Stat. 570 (1958), 49 U.S.C. 13(4), that Utah intra-

state freight rates, apart from specified exceptions, caused undue discrimination against, and an undue burden on, interstate commerce to the extent that they did not include increases which the railroads maintained on like traffic between points in Utah and adjoining states, under authority granted by the Commission in three nationwide revenue proceedings. (*Ex parte No. 175,* 280 I.C.C. 179, 281 I.C.C. 557, 284 I.C.C. 589; *Ex parte No. 196,* 298 I.C.C. 279; *Ex parte No. 206,* 299 I.C.C. 429, 300 I.C.C. 633).

In *Public Service Commission* v. *United States,* 356 U.S. 421, this Court held invalid an earlier order of the Commission directing the railroads operating in Utah to raise their intrastate rates, with certain exceptions, by amounts comparable to the increases authorized in interstate rates in *Ex parte No. 175, supra.* The ground of decision was that the evidence was insufficient, under the standard of proof required in a Section 13(4) proceeding, to support two related findings of the Commission—"that existing intrastate rates were abnormally low and failed to contribute their fair share of revenue needs of the railroads" (356 U.S. at 424) and "that the conditions incident to intrastate transportation were not more favorable than those incident to interstate movements" (*id.* at 425). With respect to the first finding, this Court said that proof that intrastate rates were lower than corresponding interstate rates was not sufficient absent "positive evidence to indicate that the relative cost of intrastate traffic was as great as that of interstate shipments" (*id.* at 426). As for the second finding, this Court observed that

proof that interstate and intrastate traffic was intermingled and handled by the same crews failed to establish substantial similarity as to all "material factors bearing on the reasonableness of rates" (*id.* at 427–428). The Court also appears to have regarded the force of the supporting evidence as seriously weakened by evidence tending to show that as to the intrastate traffic the density was greater, the operating ratios lower and the returns higher than comparable systemwide figures on interstate traffic (*id.* at 428).

The Court also noted that, although the findings gave no indication that the Commission had "concerned itself with the revenues derived from, or the conditions incident to, intrastate passenger operations" (*ibid.*), the Court's opinion in *Chicago, M., St. P. & P. R.* v. *Illinois*, 355 U.S. 300, 308, required the Commission, in a revenue proceeding involving intrastate freight rates, to give consideration to revenue derived from other intrastate services (*id.* at 428–429).

On remand of the proceeding to the Commission, it was consolidated with applications requesting the Commission to determine the lawfulness of Utah intrastate freight rates in relation to the increased interstate rates authorized in *Ex parte No. 196* and *Ex parte No. 206, supra.*

The Commission found, on the evidence before it on further hearing, that the Utah interstate and system densities "exceed[ed] those for [Utah] intrastate operations by at least three times" (309 I.C.C. 149, 164), and that labor costs, constituting about 62% of total operating expenses, were greater for Utah intra-

state than for Utah interstate traffic (*ibid.*).[1] Moreover, the Commission, on a reappraisal of the density statistics referred to by this Court in its decision in the case, found that those statistics could be given little weight because the Utah figures comprised both interstate and intrastate operations, and therefore treated as Utah traffic, bridge or overhead traffic (constituting more than 50% of the total (*id.* at 155)), which neither originated nor terminated in Utah (*ibid.*).

Neither the State of Utah nor its Public Service Commission is a party to the present suit attacking the Commission's order, which was filed solely by appellant Utah Citizens Rate Association.[2] The district court unanimously dismissed the action (J. St. 37).[3]

---

[1] The Commission's more detailed, underlying findings were that the Union Pacific's wage cost per 1000 car miles was $23.52 for through trains and $226.07 for local trains; that the Denver and Rio Grande's wage cost per 1000 car miles was $20.01 for through trains and $220.58 for local trains; and that, for both railroads, some 90% of the through train traffic was interstate, whereas less than half of their local train traffic was interstate (309 I.C.C. 156). As to the Western Pacific, over 99% of its through train traffic was interstate, whereas on its local trains only 38% of the traffic was interstate (*ibid.*).

The district court, on the day of the hearing before it, granted appellant Structural Steel & Forge Co., one of the Association's shipper members, leave to become a party plaintiff. On the question of legal standing to maintain the action, the court held that the Rate Association could not, but that the plaintiff shipper could, maintain the action (J. St. 25–28).

[3] The opinion was written by District Judge Christenson. He had dissented from the district court affirmance of the order found invalid in 356 U.S. 421, upon the ground that certain crucial Commission findings lacked adequate evidentiary support. *Public Service Commission* v. *United States*, 146 F. Supp. 803, 810–818 (D. Utah) (dissenting opinion).

It held that the Commission's findings had adequate evidentiary support, and said that it believed, after careful examination of the record, that "the prior deficiencies have been corrected within the law of the case" (J. St. 36). It also held that Section 13(4) of the Interstate Commerce Act, as amended in 1958, made it unnecessary for the Commission to concern itself with intrastate passenger revenues and conditions unless the parties supporting the existing intrastate freight rates made an affirmative showing that conditions in the intrastate passenger field were such as to militate against the conclusion that the intrastate freight rates, by reason of inadequate contribution to the railroads' revenue needs, unjustly discriminated against interstate commerce (see J. St. 29–35).

ARGUMENT

This appeal presents no substantial question for review by this Court.

1. Appellants contend that in certain respects the evidence with reference to costs and revenue is insufficient to support the finding that conditions incident to intrastate transportation were not more favorable than those incident to interstate transportation. The contentions, developed under the headings "Terminal Costs," "Density" and "Comparative Rates" (J. St. 14–19), however, are without substance, and must be evaluated in the light of appellants' failure to allege or claim a lack of evidence to support the many detailed findings by the Commission (309 I.C.C. at 155–158, 164) which underlie its ultimate finding.

Terminal Costs. Appellants complain that, with the exception of evidence rejected by the Commission as unreliable, there is no evidence to show terminal costs and that there is therefore no evidence respecting a material cost factor.[4] In *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 511, the full Commission declared that terminal costs "are relatively much more of a factor in the short-haul than in the long-haul costs," and that about 94% of the costs for distances over 75 miles is for the line haul. As for Utah, the Commission found in its original report in this proceeding that intrastate traffic moves on "relatively short hauls," whereas interstate traffic moves on "relatively long hauls." *Utah Intrastate Freight Rates and Charges*, 297 I.C.C. 87, 104. It follows therefore that, if it were possible to allocate terminal costs to intrastate and to interstate commerce accurately, the allocation would substantiate the other compelling evidence as to the higher cost of intrastate operations.

Density. Although appellants raise a question as to density, they do not contend that the Commission's finding that the density of Utah interstate traffic was at least three times as great as that of Utah intrastate traffic (309 I.C.C. at 164) lacks evidentiary support. Rather, appellants attack the premise behind the finding, relying on a statement in the dissenting opinion of Mr. Justice Frankfurter in *Public Service Com-*

[4] Appellants quote (J. St. 14) *Des Moines & Central Iowa R. v. Chicago, B. & Q. R. Co.*, 232 I.C.C. 489, 494, a ruling by a division of the Commission that "[p]ractical operating men have estimated that 40 percent of the transportation expense of the carriers is involved in their terminals."

mission, supra, 356 U.S. at 453, that a comparison between the density of interstate traffic within a state and the density of its intrastate traffic, although of some probative value, becomes entirely reliable only if the equivalence between "the density of interstate traffic within the state" and the "density of interstate traffic for the entire region for which the interstate rates have been set" be assumed. But in the passage cited by appellants Mr. Justice Frankfurter was only discussing the probative value of the "density figures" which the Court had considered in its opinion (see *id.* at 452), and the kind of density figures which would be of optimum probative value. The Justice did not imply that such optimum proof was a requisite in the present type of proceeding; indeed the burden of his dissent was that the Court had applied an unduly rigorous standard of proof.

Comparative Rates. Appellants also question whether there was sufficient valid evidence to sustain the Commission's finding that intrastate rates were below those of interstate rates for comparable distances. The government's brief in the prior appeal (No. 15, October Term, 1957, pp. 14–15), however, referred to the findings that, for many major commodities, interstate rates were materially higher than corresponding intrastate rates, and this Court (356 U.S. at 424) referred to the evidence of such rate disparity without questioning its sufficiency. Moreover, this rate disparity has necessarily been increased by the higher interstate rates authorized in *Ex parte No. 196* and *Ex parte No. 206, supra.* Finally, as this Court observed in *King* v. *United States,* 344 U.S.

254, 275: "Where the Commission seeks to deal generally with rates and revenues in a large area on evidence typical of the area as a whole, it may proceed by way of a general order supported by sufficient evidence applicable to the whole territory." The 1958 amendment to Section 13(4) went far to validate the test applied in *King* and in various prior decisions of this Court dealing with Section 13(4) orders. See Conference Committee Report on the 1958 Amendment, 104 Cong. Rec. 15527, quoted *infra*, pp. 9–10.

2. Appellants further contend that the Commission erroneously failed to inquire into the question of whether or not the railroads' intrastate passenger operations were more favorable, by resulting in relatively lower deficits, than their interstate passenger operations. But both the Commission and the district court correctly ruled that the 1958 amendment to Section 13(4) made such inquiry unnecessary (see *e.g.*, J. St. 29–35).

Prior to the amendment, Section 13(4) provided that, whenever the Commission, after a hearing, finds that any rate or fare imposed by authority of a state causes "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," it shall prescribe the rate or fare thereafter to be charged which will remove such discrimination. The 1958 amendment added the following clause after the words "interstate or foreign commerce":

> (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results

> thereof of any carrier, or group or groups of carriers wholly within any State), * *

The Conference report on the bill made the meaning and effect of the above change in Section 13(4) unmistakable. The report pointed out that the amendment "deals with the nature of the evidence to support a finding of undue discrimination." 104 Cong. Rec. 15527. The report further stated (*ibid.*):

> Apparently the holdings in these cases [*Chicago, M., St. P. & P. R.* v. *Illinois,* 355 U.S. 300; *Public Service Commission* v. *United States,* 356 U.S. 421] mean that the required finding of undue discrimination against, or undue burden on interstate or foreign commerce can be made only in the light of the overall statewide totality of a carriers operating results arising from all the rates applicable within a State.
>
> This would preclude the ICC from making such a finding on a showing of only the effect of the particular intrastate rate or rates in question. The ICC could not under such a rule continue to function effectively in removing unjust discrimination against interstate commerce caused by intrastate rates. In addition, the burden on the carriers of presenting in evidence a separation of interstate and intrastate property, revenue, and expenses would impose an intolerable accounting problem and an almost impossible burden of proof.
>
> As stated in the dissenting opinion of four justices in the Utah case, a consequence of the decisions "would be a radical, and in all likelihood unworkable, change in the way the

Commission has administered the provisions of section 13(4) for over 35 years."

It is essential that the standard of proof acceptable for 35 years be maintained. That is the purpose of this amendment.

3. An additional ground for affirmance of the judgment below is that the only shipper plaintiff maintaining the present action to review the Commission's state-wide revenue order lacked standing.[3] The challenged order imposed no command upon the shipper, and the Commission specifically stated that its findings "relate to Utah intrastate rates generally, and are without prejudice to reexamination, upon complaint or otherwise, as to the lawfulness of any individual Utah intrastate rate on any particular commodity" (309 I.C.C. at 166–167). There is thus at least serious doubt as to whether the shipper, who was not a party to the administrative proceedings, may call into question the lawfulness of a state-wide revenue order, which imposes no command on him, and under which he is free to obtain a determination of the lawfulness of any individual rate or rates affecting him. See *Georgia Public Service Commission* v. *United States*, 283 U.S. 765, 772; *Alexander Sprunt & Son* v. *United States*, 281 U.S. 249, 255; *Wisconsin R.R. Commission* v. *Chicago, B. & Q. R.R.*, 257 U.S. 563, 591.

[3] Appellants have not challenged the holding below that appellant Rate Association lacks standing to maintain the action.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

ARCHIBALD COX,
Solicitor General.
W. WALLACE KIRKPATRICK,
Acting Assistant Attorney General.
CHARLES H. WESTON,
JOEL E. HOFFMAN,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
CHARLIE H. JOHNS, JR.,
Associate General Counsel,
Interstate Commerce Commission.

MARCH 1961.

U. S. GOVERNMENT PRINTING OFFICE 1961

FILE COPY

No. 712

JAMES R. BROWN

In the Supreme Court of the United States

OCTOBER TERM, 1960

UTAH CITIZENS RATE ASSOCIATION and STRUCTURAL STEEL & FORGE CO.,

Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY,
THE WESTERN PACIFIC RAILROAD COMPANY,
UTAH RAILWAY COMPANY,
TOOELE VALLEY RAILWAY COMPANY,
SALT LAKE GARFIELD AND WESTERN RAILWAY COMPANY,
THE OGDEN UNION RAILWAY AND DEPOT COMPANY,

Appellees.

On Appeal from the United States District Court for the District of Utah

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

CALVIN L. RAMPTON
Counsel of Record for Appellants
721 Continental Bank Building
Salt Lake City, Utah

INDEX

	Page
The Effect of the Transportation Act of 1958	2
Density	3
Terminal Costs	4
Comparative Rates	4
Conclusion	9
Proof of Service	10
Appendix A	12

CASES CITED

Public Service Commission of Utah v. United States, 346 U.S. 421, 2 L.ed 2d. 886	2

No. 712

In the Supreme Court of the United States

OCTOBER TERM, 1960

UTAH CITIZENS RATE ASSOCIATION and
STRUCTURAL STEEL & FORGE CO.,
Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY,
THE WESTERN PACIFIC RAILROAD COMPANY,
UTAH RAILWAY COMPANY;
TOOELE VALLEY RAILWAY COMPANY,
SALT LAKE GARFIELD AND WESTERN RAILWAY COMPANY,
THE OGDEN UNION RAILWAY AND DEPOT COMPANY,
Appellees,

On Appeal from the United States District Court
for the District of Utah

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

The United States of America and the Interstate Commerce Commission and also the respondent railroads have filed motions to affirm in the above entitled cases. Both of these

motions purport to be based upon the ground that the questions presented in the jurisdictional statement of the appellants are so unsubstantial as not to need further argument.

In the rather strenuous efforts made in these briefs, particularly the railroads' brief, to establish that the questions we raise are unsubstantial, the respondents succeed only in pointing up the fact that the questions raised are very substantial and are such as to warrant the attention of this court.

The Effect of the Transportation Act of 1958

Both the Interstate Commerce Commission order and the decision of the court take the position that the amendments to Section 13 of the Interstate Commerce Act effectuated by the Transportation Act of 1958 relieve the Interstate Commerce Commission of the obligation in an application for a freight rate increase of giving any consideration to the effect of a passenger deficit.

On page 3 of the Interstate Commerce Commission order, the Commission takes cognizance of the requirement of this court in Public Service Commission of Utah v. United States, 346 U.S. 421, 2 L.ed. 2nd 886 that they consider in arriving at their findings the effect of "the revenues derived from, or the conditions incident to, intrastate passenger operations." As a reason for departing from the requirement of this court, they cite the 1958 Amendment.

Likewise the court below cited these amendments as a basis for holding that the Commission need not concern itself with passenger operations, which admittedly it did not do. This same position is taken by the railroads in their brief on pages 21 and 22. The government in its brief states in regard to the necessity of inquiring into passenger operations

both the Commission and district court correctly ruled that the 1958 amendments to Section 15 (4) of the Interstate Commerce Act made such inquiry unnecessary.

It is our position as set forth in our jurisdictional statement that such interpretation of the act is not warranted. We represent to the court that, while our interpretation of this act is not in accord with the Interstate Commerce Commission or the court below, it is by no means far fetched. It is a matter which has not been determined by this court, and which is certainly of wide public interest. This court, therefore, should take jurisdiction of this appeal for the purpose, if no other reason exists, of deciding whether or not the amendments to the Transportation Act of 1958 obviate the necessity of the commission, in a case of this type, giving consideration to the effect of the passenger deficit as it affects the reasonableness of both interstate rates and intrastate rates.

Density

From the record these things are clear in regard to density of traffic:

1. The total Utah traffic is made up of a greater percentage of interstate than it is of intrastate traffic.

2. The total density of traffic within the state of Utah is much greater than the density systemwide on the respondent roads.

3. Operating ratios for total Utah traffic are much more favorable than for systemwide traffic.

4. There is no reliable breakdown of operating ratios between Utah intrastate traffic and that portion of interstate traffic within the state of Utah.

The evidence in this regard is no different than it was when this case was previously before this court, except as to the breakdown in the state of Utah between interstate and intrastate volume. We have pointed out in our jurisdictional statement why we felt that this particular breakdown is not persuasive. We have shown that it is not the type of study relied upon by the court in the previous case, nor is it the type of study recommended by Mr. Justice Frankfurter in his dissenting opinion.

The question of whether or not the showing as to relative density of intrastate and interstate traffic within the state of Utah is sufficient to overcome the showing that total Utah traffic is much more favorable than systemwide traffic is certainly a question of substance which this court should consider in view of the holding in Public Service Commission of Utah v. United States, supra.

Terminal Costs

It is conceded by all that there is no study showing the application of terminal costs as to interstate and intrastate costs, except that showing which may arise from the separation of total costs by the North Carolina formula. The question of whether or not the Commission may base a finding to the effect that terminal costs are not more favorable to interstate than to intrastate traffic upon evidence which it characterized as "unreliable for the purpose intended" is a question of substance which warrants this court in taking jurisdiction of the appeal.

Comparative Rates

The question of whether or not the railroads introduced evidence from which it could be found that Utah intrastate

rates were not already as high or higher than interstate rates without any further increases was a question of enough substance to cause one of the Interstate Commerce Commissioners to dissent in the decision. We wish to quote against from the dissent of Commissioner Freas as follows:

> "If it is conceded that intrastate costs here are at least as high as interstate costs for similar traffic units, it is not established that unit revenue derived from the intrastate traffic is not also higher than that derived from interstate traffic."

Certainly if the evidence is as Commissioner Freas says it is, then the order should be set aside. Whether or not the evidence is as Commissioner Freas says it is, is a question of great substance.

Because of the treatment which the railroad respondents have given comparative rates in their brief, we feel that we must go into this matter in more detail. The railroads first attempt to rely on Exhibit I-CR to the effect that the railroads average revenue per ton mile on interstate traffic is higher than their average per ton mile on Utah intrastate traffic. This is true, but for a reason which the railroads do not mention. The record is replete with evidence that Utah's consist of traffic is much heavier weighted percentage wise in favor of heavier loading, lower revenue, lower cost products of the mine than is the systemwide consist of traffic of the same railroads. It is to be expected that the average per ton mile revenue from products of the mines will be lower than the average per ton mile revenue from box car traffic, but the cost of handling it is also lower. In order to get a comparison that means anything, it is necessary to compare rates on like commodities interstate and intrastate. This it is possible to do from the record.

On page 24 of their brief, the railroads state:

> "Counsel refers to Exhibit 9 CR through 20 CR and argues that if the examples therein contained are reduced to a revenue per mile basis, then in the great majority of cases the car-mile earnings on intrastate rates are substantially higher than the car-mile earnings on interstate rates. Counsel has pointed to not one single example from any of such exhibits, and the exhibits show exactly the contrary."

In view of this statement, we wish to point out examples from all exhibits CR 12 through CR 20. In most of these exhibits the interstate rates selected are for much longer distances than the intrastate rates, and we agree that normally on a ton mile basis the longer the haul the lower the rate per ton mile. However, the railroads bear the burden of proof. Taking their own exhibits, we have selected the longest intrastate haul of a given commodity and the shortest interstate haul of a given commodity to get as accurate a comparison as possible. The result of this study is shown on Appendix A. It shows that in most cases the car mile earnings of the railroads were higher on intrastate traffic before the increases were applied, and in every case with the increases applied that the car mile earnings on intrastate traffic are substantially higher.

Exhibit 57 introduced by the protestants before the Interstate Commerce Commission covers LCL shipments out of Salt Lake City to various points in the state of Utah, and also to various points in the state of Idaho. This exhibit shows that the intrastate rates for comparative distances were generally higher before the intrastate increases were applied than were the interstate rates including all the increases.

The following are typical examples:

From	To	Distance	Rate Per 100 Lbs.
	I. PAINT		
Salt Lake City, Utah	Thompson, Utah	217	1.69
Salt Lake City, Utah	Pocatello, Idaho	170	1.06
Salt Lake City, Utah	Idaho Falls, Idaho	221	1.25
Salt Lake City, Utah	Rock Springs, Wyo.	227	1.24
	II. REFRIGERATORS		
Salt Lake City, Utah	Thompson, Utah	217	2.53
Salt Lake City, Utah	Pocatello, Idaho	170	1.49
Salt Lake City, Utah	Idaho Falls, Idaho	221	1.80
Salt Lake City, Utah	Rock Springs, Wyo.	227	1.69
	III. RADIOS AND TELEVISION SETS		
Salt Lake City, Utah	Thompson, Utah	217	2.92
Salt Lake City, Utah	Pocatello, Idaho	170	1.06
Salt Lake City, Utah	Idaho Falls, Idaho	221	1.25
Salt Lake City, Utah	Rock Springs, Wyo.	227	1.24
	IV. DRUGS		
Salt Lake City, Utah	Thompson, Utah	217	2.53
Salt Lake City, Utah	Pocatello, Idaho	170	1.78
Salt Lake City, Utah	Idaho Falls, Idaho	221	2.11
Salt Lake City, Utah	Rock Springs, Wyo.	227	1.98
	V. BUILDERS HARDWARE		
Salt Lake City, Utah	Thompson, Utah	217	2.53
Salt Lake City, Utah	Pocatello, Idaho	170	1.49
Salt Lake City, Utah	Idaho Falls, Idaho	221	1.80
Salt Lake City, Utah	Rock Springs, Wyo.	227	1.80
	V. CANNED GOODS		
Salt Lake City, Utah	Thompson, Utah	217	1.69
Salt Lake City, Utah	Pocatello, Idaho	170	1.06
Salt Lake City, Utah	Idaho Falls, Idaho	221	1.25
Salt Lake City, Utah	Rock Springs, Wyo.	227	1.24

VII. ROOFING

Salt Lake City, Utah	Thompson, Utah	217	1.69
Salt Lake City, Utah	Pocatello, Idaho	170	1.06
Salt Lake City, Utah	Idaho Falls, Idaho	221	1.25
Salt Lake City, Utah	Rock Springs, Wyo.	227	1.24

VIII. MACHINER

Salt Lake City, Utah	Thompson, Utah	217	2.53
Salt Lake City, Utah	Pocatello, Idaho	170	1.06
Salt Lake City, Utah	Idaho Falls, Idaho	221	1.25
Salt Lake City, Utah	Rock Springs, Wyo.	227	1.24

Exhibit 58 shows the following in regard to coal with the intrastate rates including only the Ex Parte 175 increases and the interstate rates including all increases:

From	To	Distance	Rate Per Ton	Revenue Per Ton Mile
Castle Gate, Utah	Preston, Idaho	251	$3.32	1.323c
Castle Gate, Utah	Park City, Utah	219	3.48	1.589c
Castle Gate, Utah	Dayton, Idaho	222	3.32	1.495c
Castle Gate, Utah	Devils Slide, Utah	183	3.48	1.902c

Exhibit 59 shows a like study on building blocks as follows:

			Rate Per 100 Lbs.	
Salt Lake City, Utah	Pocatello, Idaho	170	.313	3.647
Salt Lake City, Utah	Fillmore, Utah	167	.303	3.593
Salt Lake City, Utah	Sinclair, Wyo.	352	.41	2.331
Salt Lake City, Utah	Cedar City, Utah	275	.38	2.764

One of the most striking examples of the inequitably high level of Utah intrastate rates without the increases here sought is found in Exhibit 60. This shows that the rate on

steel from Geneva, Utah, to Salt Lake City, Utah, a distance of 38 miles, was $3.25 per ton including only the Ex Parte 175 increases, and has now been increased to $3.63. The rate on a similar shipment from Kaiser, California, to Los Angeles, California, a distance of 46 miles, is only $2.20, including all increases. The circumstances surrounding these rates are similar. Each rate applies to an 80,000 lb. minimum. In each case, the haul involved is over a flat terrain and in each case the density of traffic is heavy. Yet the railroads apply a 65% higher rate to Utah intrastate traffic than to intrastate traffic in another state.

From the foregoing, it is seen that there is ample support in the record for Commissioner Freas' dissent from the Interstate Commerce Commission Order on the basis of the railroads' showing as to comparative rate levels before the intrastate increase but including the increase on interstate rates.

Conclusion

Counsel submits that the questions here presented are not only substantial, but are questions of such far reaching public importance as to warrant the time and attention of this court in considering this matter and rendering a decision thereon.

Respectfully submitted,

CALVIN L. RAMPTON
Counsel of Record for Appellants
721 Continental Bank Building
Salt Lake City, Utah

PROOF OF SERVICE

I, CALVIN L. RAMPTON, attorney for the appellants herein and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the ..... day of March, 1961, I served copies on the foregoing Brief in Opposition To Motion to Affirm on the several parties thereto as follows:

1. On the United States, by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah, at Room 200 Federal Building, Salt Lake City, Utah, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D.C., and to Robert A. Bicks, Acting Assistant Attorney General, Department of Justice, Washington, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope with air mail postage prepaid, to Robert W. Ginnane, Esq., Gen. Counsel, and to Charles H. Johns, Assistant Counsel, at the offices of the Commission, Washington 25, D.C.

3. On the intervening defendants by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective counsel of record as follows:

To:

Bryan P. Leverich, Esq.
A. U. Miner, Esq.
Union Pacific Annex
Salt Lake City, Utah

Elmer B. Collins, Esq.
Union Pacific Railroad
Omaha, Nebraska

L. W. Hobbs, Esq.
Union Pacific Railroad
1416 Dodge Street
Omaha, Nebraska

Ernest Potter, Esq.
Rio Grande Bldg.
Denver, Colorado

Albert R. Bowen, Esq.
Deseret Bldg.
Salt Lake City, Utah

S. N. Cornwall, Esq.
65 So. Main
Salt Lake City, Utah

Walter G. Treanor, Esq.
Western Pacific Railroad
526 Mission Street
San Francisco 5, Calif.

CALVIN L. RAMPTON
721 Cont'l Bank Bldg.
Salt Lake City, Utah
Attorney for Appellants

APPENDIX A

Line No.	Page No.	From	To	Miles	Rate Before Increase	Car Mile Earning	Present Rate	Car Mile Earning
Exh. 12 Cr		*Clay and Bentonite*						
25	2	Denver, Colo.	Salt Lake City, Utah	570	.65 cwt	.707	.65 cwt	.707
8	1	Ivie, Utah	Geneva, Utah	115	3.18 nt	1.337	4.35 nt	1.828
Exh. 13 Cr		*Gravel and Sand*						
2	2	Boise, Ida.	Provo, Utah	452	6.03 nt	.667	6.03 nt	.667
5	1	Cedar City, Utah	Salt Lake City, Utah	275	3.33 nt	.628	4.42 nt	.833
Exh. 14 Cr		*Limestone (Lime Rock)*						
1	2	Victorville, Calif.	Salt Lake City, Utah	671	.47 cwt	.283	.47 cwt	.283
2	1	Cisco, Utah	Garland, Utah	201	2.21 nt	.654	2.95 nt	.873
Exh. 15 Cr		*Gasoline*						
1	3	Boise Junction, Ida.	Salt Lake City, Utah	407	.59 cwt	.768	.59 cwt	.768
6	1	Pioneer, Utah	Cedar City, Utah	281	.41½ cwt	.790	.49 cwt	.933
Exh. 16 Cr		*Fuel Oil, Distillate, Etc.*						
2	3	Oakland, Calif.	Ogden, Utah	775	.91 cwt	.849	.91 cwt	.849
2	1	Pioneer, Utah	Cedar City, Utah	281	.35 cwt	.837	.47 cwt	.984
Exh. 17 Cr		*Iron or Steel*						
5	3	Minnequa, Colo.	Hiawatha, Utah	533	.73 cwt	1.435	.73 cwt	1.435
11	1	Geneva, Utah	International, Utah	85	5.44 nt	2.818	7.44 nt	3.854
Exh. 19 Cr		*Molasses*						
1	2	Lincoln, Idaho	West Jordan, Utah	239	5.39 nt	1.325	5.39 nt	1.325
6	1	Lewiston, Utah	Salt Lake City, Utah	126	2.72 nt	1.270	3.72 nt	1.737
Exh. 20 Cr		*Beet Pulp*						
1	3	Lincoln, Idaho	Madsen, Utah	159	.26 cwt	.747	.26 cwt	.747
3	2	West Jordan, Utah	Greenwood, Utah	164	.22 cwt	.704	.30 cwt	.959